89-346

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALASKA AIRLINES, INC. and USAIR, INC.,
Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

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QUESTION PRESENTED

May a State constitutionally tax airplanes based on their flight over that State?

PARTIES TO THE PROCEEDINGS

Petitioners Alaska Airlines, Inc. and USAir, Inc. were plaintiffs-appellants in the court below. Respondent Department of Revenue, State of Oregon, was defendant-appellee in the court below. As required by Rule 28.1, petitioners state that Alaska Air Group, Inc. is the parent company of petitioner Alaska Airlines, Inc. USAir Group, Inc. is the parent company of USAir, Inc.

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Petitioners Alaska Airlines, Inc. ("Alaska Air") and USAir, Inc. ("USAir") petition this Court for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 769 P.2d 193 and is reprinted in the Appendix to this Petition ("App.") at 1a. The opinion of the Oregon Tax Court is reported at 10 O.T.R. 518 and is reprinted at App. 17a. The decisions of the Oregon Department of Revenue are unreported and are reprinted at App. 26a, 30a.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on May 1, 1989. App. 32a. On July 25, 1989, Justice O'Connor entered an order extending the time

for filing a petition for a writ of certiorari to and including August 29, 1989. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall . . . deprive any person of . . . property . . . without due process of law . . . ."

STATEMENT OF THE CASE

This case presents the question whether a State may constitutionally tax interstate commercial aircraft simply because they have flown over that State. The Oregon tax authorities determined that a State may do so, and they have been upheld by the Oregon Tax Court and the Oregon Supreme Court.

Under Oregon law, the Oregon Department of Revenue ("DOR") is required to make an "annual assessment" of property that has "a situs" in the State and is held for use by certain "designated utilities and companies." Oregon Revised Statutes ("O.R.S.") § 308.515(1)(a). The assessment requirement is applicable to companies engaged in "air transportation," whether "in domestic or interstate commerce or both." *Id.*

When a company operates "both within and without" Oregon, DOR is authorized to value the company's total property "as a unit" and thereafter to determine what part of that "unit" is properly attributable to the State. O.R.S. §§ 308.550, .555. In determining the portion attributable to Oregon, DOR is authorized to employ any

method that is "reasonable." O.R.S. § 308.550(2). The Oregon Supreme Court has interpreted the term "reasonable" as constituting "a codification of the limits imposed by the due process and commerce clauses of the United States Constitution." [1]

A. DOR's Formula for Taxing Airplanes

Based on the foregoing, DOR devised the following time-based formula to assign an in-State taxable value to a given carrier's airplanes flying interstate routes:

$$\text{Oregon Taxable Value} = \text{Total Aircraft Value} \times \frac{\begin{array}{c}\text{Total Oregon Time for Carrier}\\ \text{(Oregon Ground Time plus}\\ \text{Oregon Flight Time plus}\\ \text{Oregon Overflight Time)}\end{array}}{\text{System-Wide Time for Carrier}}$$

Thus, the formula first totals the ground time for each of a carrier's take-offs or landings in Oregon (Oregon ground time); the formula then adds the flight time in Oregon for all of the carrier's flights originating or terminating in the State (Oregon flight time); next, it allocates to Oregon all time spent by the carrier's flights passing *over* Oregon on their way to and from other States (Oregon overflight time); finally, it divides this total time allocated to Oregon by the carrier's systemwide time. The resulting fraction determines the portion of the total value of the carrier's aircraft that Oregon taxes.

B. DOR's Taxation of Petitioners

DOR applied this valuation method to the present petitioners, Alaska Air and USAir.[2] Both companies were

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[1] *Southern Pacific Transportation Co.* v. *Dept. of Revenue*, 732 P.2d 18, 21 (1987).

[2] At the time DOR first applied its formula to USAir's aircraft, they were owned by Pacific Southwest Airlines, Inc. ("PSA"). However, due to the merger between PSA and USAir in 1988,

incorporated outside Oregon; both maintained their corporate headquarters, flight-training facilities, major repair facilities, and base-maintenance facilities outside the State; and only 1% of each company's work force is employed in Oregon. App. 4a.

In 1985, the year here at issue,[3] both companies operated commercial airline flights that landed in Oregon; in addition, owing largely to Oregon's location between major West-coast cities, both carriers had a significant number of flights that merely flew over Oregon enroute to other States. Indeed, both companies had significantly more flights passing *over* Oregon than flights *landing* in the State. Specifically, Alaska Air's 1985 ratio of overflights to in-State flights was 1.57; USAir's ratio was even larger, 2.66.[4] As a result, under DOR's formula, 45% of Alaska Air's assessed aircraft value attributed to Oregon and fully 49% of USAir's value attributed to Oregon was based solely on such overflights. App. 4a. Stated in dollar terms, by including overflight in its taxation formula, DOR nearly *doubled* Alaska Air's assessed Oregon value—from \$11.7 million to \$21.3 million; it similarly increased USAir's assessed value—from \$13.2 million to \$26.1 million.[5]

USAir was substituted as the real party in interest in the Oregon Supreme Court (App. 4a n.1) and is the petitioner here.

[3] DOR's tax assessment date is January 1 and is based on data for the previous year. Thus, the valuation date in this case is January 1, 1986 and rests on 1985 data.

[4] In 1985, Alaska Air had 6,858 Oregon flights and 10,747 overflights, producing its ratio of 1.57. In 1985, USAir had 3,852 Oregon flights and 10,236 overflights, producing a ratio of 2.66. Each carrier's number of overflights and in-State flights is derived from data the carriers file with the U. S. Department of Transportation on ER 586, Domestic Service Segment Data.

[5] The difference in assessed value is calculated simply by removing overflights from Oregon's assessed value.

C. The Tax Court's Decision

Alaska Air and USAir challenged DOR's assessment in the Oregon Tax Court, contending that the effective taxation of their fly-overs violated both the Due Process and Commerce Clauses of the U.S. Constitution. The Tax Court agreed that petitioners' planes had been taxed on the basis of their overflights, holding that that was "precisely the effect of including [the overflights] in the formula." App. 24a n.4. It furthermore agreed that Oregon could not constitutionally tax the overflights unless they had a nexus with or "situs" in the State. App. 19a. The court found this nexus requirement met on two alternative grounds: (1) Oregon's criminal law "extends into the skies" to the overflying planes and any such planes that might fall from the skies would receive the State's "search and rescue" benefits; and (2) in any event, the State's benefits to petitioners' planes that *land* in Oregon "are sufficiently great to extend to *all* of [their] property," including their planes that merely fly over. App. 24a-25a (emphasis supplied). The court therefore affirmed the tax.

D. The Oregon Supreme Court's Decision

Petitioners appealed the Tax Court's decision to the Oregon Supreme Court, again contending that the substantial tax on their overflights violated the Due Process and Commerce Clauses. The State's Supreme Court recognized that Oregon provided no regular services to petitioners' overflights. App. 4a. Indeed, it expressly acknowledged that the only governmental service provided the overflights was exclusively *federal*: "radio communication with radar tracking by air traffic controllers of the Federal Aviation Administration." App. 5a. Nevertheless, as did the Tax Court, the Oregon Supreme Court rejected petitioners' contention that the substantial tax on their overflights violated the Constitution.

Unlike the Tax Court, the Oregon Supreme Court first reasoned that petitioners' overflights had *not* in fact been

taxed: "[t]he validity of each airline's tax assessment does not depend upon whether the State could have assessed a tax against overflights—*the state did not do so.* Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit." App. 8a (emphasis supplied). Because petitioners' aircraft *as a unit* did have significant State contacts—"through aircraft landings, departures, boarding and deplaning of passengers and unloading of cargo"—the court held those contacts sufficient "to sustain the power of this state to levy an *apportioned* ad valorem tax." App. 8a (emphasis supplied). The court therefore saw the central question as whether petitioners' property had been fairly apportioned to the State.

In resolving this apportionment question, the court recognized that the State could not tax extraterritorial values, but only those fairly attributable to activities "in" Oregon. App. 9a. The court furthermore acknowledged that overflights are not "in" Oregon the way that railroad tracks, for example, are "in" the State, and that valuing aircraft on the basis of their overflight is therefore not equivalent to valuing rolling stock on the basis of in-State railroad tracks. As the court stated, "[r]olling stock and railroad track touch the ground, but aircraft in flight, obviously, do not." App. 9a. Nevertheless, the court concluded that petitioners' overflights were "in" Oregon for purposes of the property tax in the same way their flights landing in Oregon were in the State; this must be so, the court reasoned, because petitioners "[did] not explain where an overflight was if not 'in' the state . . . . 'In' would seem to be the answer because [of] . . . the applicability of Oregon criminal law to overflights." App. 10a.

Having thus concluded that petitioners' aircraft as a unit had a "situs" in the State, and that the overflight component of this unit was "in" the State, the court

found DOR's formula consistent with the Due Process Clause. App. 10a. For substantially the same reasons, it also found the formula consistent with the Commerce Clause. App. 12a-14a. The court therefore affirmed the tax against petitioners.

REASONS FOR GRANTING THE WRIT

This Court should grant review in this case for three reasons: (1) the lower court's approval of the challenged tax directly contradicts decisions of this Court; (2) the State courts are currently divided over the constitutionality of such taxes; and (3) such taxes, if permitted to stand, would have a significant, disruptive impact on the airline industry, the nation's transportation system, and the consumers served by that system.

I. THE LOWER COURT'S DECISION DIRECTLY CONTRADICTS DECISIONS OF THIS COURT

The Oregon Supreme Court thought that the question of taxing airplane overflight "ha[d] not before been raised" in this Court. App. 9a. In fact, it has often been raised here; more importantly, it has been repeatedly decided by this Court *directly contrary* to the reasoning and judgment of the lower courts in this case. Indeed, just last Term in *Goldberg* v. *Sweet*, 109 S. Ct. 582 (1989), this Court expressly noted that a "State has no nexus to tax an airplane based solely on its flight over the State." [6] *Goldberg's* recognition of this principle simply reflects a long line of cases that began with *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944).

In *Northwest Airlines*, this Court for the first time addressed the constitutionality of a State tax levied on planes of an interstate airline. There, the Court held that only an airline's domiciliary State may lay a property

[6] *Id.* at 589 (citing *United Airlines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring)).

tax on the airline's planes flying interstate, unless another State has "shown . . . that a defined part of the [planes] has acquired a permanent location, *i.e.*, a taxing situs" in that other State. *Id.* at 295, 298. In his concurring opinion, Justice Jackson expressly stated what has become the law of this Court: "*flight over a state* either casually or on regular routes *confers no jurisdiction to tax.*" *Id.* at 304 (emphasis supplied).

Subsequently, in *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), the Court addressed the showing that a nondomiciliary State must make to demonstate that a "defined part" of a carrier's fleet has in fact acquired a taxable "situs" in that other State. The standard to be applied, the Court held, is whether the nondomiciliary State's tax "in practical operation" is shown to have a nexus with specific "opportunities, benefits, or protection conferred or afforded by [that] State." *Id.* at 600 (quoting *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949)). Because Braniff's aircraft were shown by Nebraska to have eighteen stops a day in that State, the Court held that "the situs issue devolves into the question whether eighteen stops per day by [Braniff's] aircraft is sufficient contact . . . to sustain . . . an apportioned ad valorem tax *on such aircraft.*" 347 U.S. at 600-01 (emphasis supplied). The Court held that "such regular contact is sufficient to establish Nebraska's power to tax," noting that "Nebraska certainly affords protection during such stops and these regular landings are clearly a benefit to [Braniff]." *Id.* at 601.

Since the *Braniff* decision, the Court has twice addressed the question whether activity *less* than the regular landings and departures shown there would meet a State's burden to show "situs" over activities of interstate aircraft. The first case was *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623 (1973). There, the question was whether a State may levy a use tax on the *full value* of aviation fuel stored in that State and then loaded aboard aircraft

to be consumed in interstate flights. The Court upheld such a tax on the basis of two critical factors: (1) States over which the planes fly would have *no* authority to levy a tax;[7] and (2) permitting a tax on the full value by the State where the fuel was stored and loaded is "a fair result," because that State "is likely to provide substantial services . . . ." 410 U.S. at 630, 631.

The latest reiteration by this Court that overflight does not provide a basis for State taxation came in *Goldberg*, a case that concerned taxation of interstate telecommunications. There, the Court held that only the originating and terminating States "have a nexus substantial enough" to tax an interstate telephone call. 109 S. Ct. at 590. To support its further holding that the States over which the call's electronic signal "merely pass[ed]" would have no basis to tax, the Court, as previously noted, relied on two of its overflight-tax decisions as follows:

> *See United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973) (*State has no nexus to tax an airplane based solely on its flight over the State*); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 302-304 (1944) (Jackson, J., concurring). [109 S. Ct. at 589 (emphasis supplied).]

As earlier indicated, the citation to Justice Jackson's opinion includes his determination that "flight over a state . . . confers no jurisdiction to tax."

In the face of these decisions—*Helson, Northwest Airlines, Braniff, United Airlines*, and *Goldberg*—it is difficult to understand how the lower courts could have found the question presented by this case to be an open one. Under this Court's decisions, planes flying over a State

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[7] In holding that fly-over States have no jurisdiction to tax, the Court relied on *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929). There the Court held that a State through which an interstate boat trip passed could not constitutionally tax fuel consumed in the passage.

are not "in the State" either for Due Process or Commerce Clause purposes. The fact that Oregon chose to tax petitioners' airplanes as "a unit" does not alter this constitutional principle. Rather, it simply means that the State had to apportion to Oregon only that part of the unit which was "in the State." Whether this case is viewed as one of nexus under the Due Process Clause, or one of apportionment under the Commerce Clause, the constitutional standard is in either event the same: a State may not tax "property not located in the taxing State." *Norfolk & Western Railway Co.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968). Such a tax "is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due." *Id.* (footnote omitted).

The *only* justification the Oregon courts gave for treating the overflights as "in the State" was their claim that Oregon's criminal laws might be applied to overflights and that search and rescue benefits might be afforded if a flight landed in Oregon on an emergency basis. There are several complete answers to these claims.

First, the claims are completely incompatible with this Court's determination that States have *insufficient* contacts to warrant overflight taxes. Second, even if this Court's decisions were not otherwise completely dispositive, under *Northwest Airlines* and *Braniff* it was DOR's burden to prove that its contacts were of such significance "in practical operation" that they effected a "situs" for the overflights. DOR never did so; indeed, for all the record shows, Oregon's asserted criminal law and search and rescue have never been applied or given any benefit to a *single* carrier overflight, must less served as a constitutional justification for multi-million-dollar assessments on overflying carriers.

It is not surprising that DOR could not make the requisite showing. Whatever criminal laws Oregon might

hypothetically apply to the overflights are rendered superflous (if not wholly pre-empted)[8] by the comprehensive, pervasive federal scheme of criminal laws relating to interstate air commerce that already prohibit: threats of harm regarding interstate flights, thefts from interstate commerce, civil disturbances on interstate aircraft, transportation of stolen goods on interstate commerce, stowaways on aircraft, transportation of firearms or ammunition by aircraft passengers, carrying weapons or explosives aboard aircraft, improperly carrying hazardous materials aboard aircraft, aircraft piracy, interference with flight crew members or flight attendants, assault, maiming, personal property theft, receiving stolen property, murder, manslaughter, attempted murder or manslaughter, sexual abuse, robbery, and conveying false information. 18 U.S.C. §§ 35, 659, 922, 2101-02, 2199, 2314; 49 U.S.C. § 1472.

Similarly lacking in substance is the claim that State assistance to emergency landings creates a taxable nexus for *all* overflights. In the first place, any emergency *landings* are already counted in DOR's formula as in-State Oregon flights, not overflights. App. 24a-25a. Second, DOR did not even begin to show that "in practical operation" its asserted search and rescue efforts have established an in-State "situs" for overflights. Quite to

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[8] As this Court held in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973), federal regulation of the nation's navigable airspace is "intensive and exclusive" (citing *Northwest Airlines*, 322 U.S. at 303 (Jackson, J., concurring)). Indeed, what Justice Jackson noted in *Northwest Airlines* is still true today:

> [Airplanes] move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. * * * [A plane's] privilege, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government. [322 U.S. at 303 (Jackson, J., concurring).]

the contary, there have been no crashes by overflying air carriers or commuter airlines in Oregon in the last 20 years—as far back as the National Transportation Safety Board has records available. Moreover, even assuming there would be need for a search and rescue operation related to an overflight air carrier crash, that operation would be performed by either civil air patrol or military flying units—which are *federally-supported* entities.

Finally, in those cases where State search and rescue services might be provided to an airline in Oregon, any cost of those services borne by the State is *already* paid for. Under O.R.S. § 493.070, all moneys received by the Aeronautics Division of the Oregon Department of Transportation from pilot registrations are paid into an Aeronautical Search and Rescue Account. "Such amount as may be necessary, and no more, is appropriated out of such account *for the payment of all expenses incurred by the division in conducting activities authorized under ORS 491.190 to search for lost planes and lost persons, the rescue of lost persons, pilot survival education and training and all other expenses directly attributable to the search and rescue program* and the registration of pilot licenses." *Id.* (emphasis supplied). Accordingly, in no event could such putative services by the State justify overflight taxes.

Furthermore, the unconstitutional burden on commerce imposed by such taxes is clear under numerous other decisions of this Court. That burden lies not only in the State's taxing of values which it has no nexus to tax and which are not properly attributable to the State. Under this Court's decisions, it is also clear that Oregon's tax: (1) risks multiple taxation of overflights, (2) operates in a discriminatory manner against those flights, and (3) impermissibly disrupts the free flow of commerce by laying tariffs on the air above a State—simply because that State happens to lie below a significant in-

terstate flight path. Each of these three points will be briefly addressed.

If other States were to adopt a time-based formula for taxing airplanes, under *Goldberg* the *only* States that would have a sufficient nexus to count overflight time for a given flight would be those States where the flight originated or terminated. Under *United Air Lines* this also would be the fair result inasmuch as those States would be the ones that provide the substantial take-off and landing facilities. Yet if an intervening State such as Oregon *also* were to count overflight time for that same flight—merely because the plane happened to pass over the State—the inevitable result would be double taxation of the same interstate flight. This is unquestionably prohibited by this Court's decisions.[9]

This Court's decisions also prohibit a tax which in practical operation either discriminates against interstate commerce in favor of intrastate commerce, or favors some participants in interstate commerce over others. *See, e.g., Goldberg* v. *Sweet*, 109 S. Ct. at 591; *American Trucking Associations* v. *Scheiner*, 483 U.S. 266, 281-87 (1987); *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). Oregon's tax discriminates in both these ways. Since flights within Oregon and those that overfly the State are taxed at the same rate—but only the former receive State services of any significance—Oregon is necessarily imposing a higher effective rate for those services on carriers with substantial overflight than those with little or none.[10] Moreover, the higher the ratio of flights be-

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[9] *See, e.g., Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 240-48 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642-46 (1984).

[10] Nine carriers with landings in Oregon also have taxable overflights (American Airlines, Alaska Airlines, Continental Airlines, Delta Airlines, America West, Northwest Airlines, USAir, United Airlines, and Horizon Airlines). But five other carriers with land-

ginning or ending in Oregon to flights merely overflying the State, the lower will be the effective rate for services rendered. Consequently, the *lowest* effective tax would be imposed on a wholly intrastate carrier, which by definition has the highest level of services provided to it by the State. Such a tax structure—obviously favoring those that "ply their trade within the State"—unconstitutionally discriminates against interstate commerce.[11]

Ironically, a tax such as Oregon's also discriminates against petitioners in favor of carriers who have substantial overflight but have *no* landings in the State. Those carriers are not taxed by Oregon *at all*, even though the Oregon Supreme Court held that their activities were "in" the State and were therefore taxable.[12] Quite arbitrarily—and discriminatorily—such a carrier is not taxed by Oregon unless it lands once, and then that one landing triggers a tax on *both* that single landing and *all* the carrier's overflight.

Finally, and perhaps most significantly, the tax in this case runs afoul of the "central tenet" of the Commerce Clause to which this Court has "steadfastly adhered"—that the Clause "by its own force created an area of trade free from interference by the States." *Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 328 (1977)). If

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ings in Oregon have no taxed overflights at all, *i.e.*, flights that merely pass over the State (Eastern Airlines, Hawaiian Airlines, TWA, United Express, and Skylink Airlines).

[11] *Scheiner*, 483 U.S. at 286. In *Goldberg*, the Court held that this kind of discrimination would not be held unconstitutional if it were directed against in-State residents or concerned activities that could not easily be measured. 109 S. Ct. at 591. Neither circumstance is presented here: both petitioners are non-domiciliaries in Oregon and their overflights have already been precisely measured.

[12] At least one domestic carrier—Pan Am—has Oregon overflight, but no landings, and is not taxed by the State.

there were in fact substantial State services associated with the passage of an interstate flight over a State, a tax could appropriately be assessed. But, as we have shown, that is not the case. Rather, simply to take advantage of its fortuitous position in the middle of the West Coast's north/south flight corridor, Oregon has erected a toll both at 35,000 feet for interstate airplanes wishing to pass over the State.[13]

As a result, if Alaska Air wished to inaugurate a new Seattle/Los Angeles flight, it must either find a circuitous route that avoids Oregon, or pay Oregon a fee for overflight. Worse, if an overflight tax like Oregon's were approved elsewhere, USAir could be subjected to *multiple* overflight tolls from the several States it must cross if it wished to offer, say, a new trans-continental flight from Pittsburgh to San Francisco. Thus, Oregon's ac-

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[13] To illustrate how disproportional overflight time is in the State of Oregon—and how much it *inflates* that State's tax—we show below each petitioner's ratio of flyover time to in-State time for the year in question (1985), both for Oregon as well as for each petitioner's operations system-wide:

		A Ground Hours & In-State Hours	B Flyover Hours	C Column B as a % of Column A
Alaska Air	Oregon only	7,830	7,566	97%
	System-wide	276,758	23,674	9%
USAir	Oregon only	6,511	6,312	97%
	System-wide	377,520	6,442	2%

As the chart demonstrates, Alaska Air and USAir have almost as much overflight time for Oregon as they do ground time and in-State flight time for that state. But system-wide this is not true at all: on average, less than 10% of petitioners' 1985 time in *all* States was overflight, owing to other States' much smaller proportion of overflight to in-State flight and ground time. As a result, in a State like Oregon—which happens to lie in the middle of important interstate flight paths—inclusion of overflight in the State's tax base greatly exaggerates its property tax. (As noted, the USAir data for 1985 refer only to PSA operations, now merged with USAir.)

tion, if upheld, would require airlines to begin making flight routing decisions no longer just on the basis of safety, operational efficiency, and air traffic control considerations; instead, they would also have to consider tolls demanded by those States that are in the path of air routes heretofore exclusively determined, maintained, and protected by the federal government. Such disruptive results are prohibited by this Court's decisions, because their "net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 170 (1954).

For all these reasons, the lower Court's decision contradicts this Court's constructions of the Due Process and Commerce Clauses. The Court should grant certiorari to enforce its own decisions and to make clear that a tax such as Oregon's is constitutionally prohibited.

II. THE VARIOUS STATE TRIBUNALS ARE DIVIDED OVER THE CONSTITUTIONALITY OF OVERFLIGHT TAXES

While petitioners believe this Court's decisions should have foreclosed the possibility that *any* State would impose a tax based on overflight, that is not the case. Courts or agencies in no less than five different States have recently had to address the permissibility of such taxes, and they are divided 3-2 on the question. The five States are Oregon, Montana, Wisconsin, Pennsylvania, and Idaho. The division among them provides further reason for this Court to grant certiorari in this case.

Prior to the Oregon decisions in this case, the Montana Supreme Court addressed the same question presented here and resolved it directly contrary to the Oregon Supreme Court. *Northwest Airlines, Inc.* v. *State Tax Appeal Board*, 720 P.2d 676 (1986). There, as here, the State's DOR had included overflight mileage in the numerator of its apportionment formula for purposes

of assessing a tax (there, an income tax) on an interstate airline. Finding that "[t]he flyover flights of Northwest have no contact with Montana"—"not even . . . radio contact"—the court invalidated the tax.[14]

On the other hand, two other States—Wisconsin and Pennsylvania—have followed Oregon's lead in imposing taxes on overflights. Wisconsin's tax is not simply on the privilege of overflight, but is imposed on drinks thought to be sold aboard the aircraft during overflight above Wisconsin. By a 3-2 vote, the Wisconsin Tax Commission upheld this tax, expressly relying on the Oregon Supreme Court's decision in this case. *Republic Airlines, Inc.* v. *Wisconsin Dept. of Revenue*, ¶ 203-058 Wisc. Tax Reports (CCH) at 14,247 (May 3, 1989). The dissenting Commissioners would have invalidated the tax, reasoning, as did the Montana Supreme Court, that activities during overflights are not "in this State." *Id.* at 14,256.

The Commonwealth of Pennsylvania likewise imposes a tax on overflights by apportioning interstate carriers' net income to that State based on miles flown over it. The DOR in the State recently rejected USAir's attack on the constitutionality of such a tax. *USAir, Inc.* v. *Pennsylvania*, No. 567 at 8 (Pa. Commw. Ct., Aug. 30, 1988) (LEXIS, States library).

Finally, the Supreme Court of Idaho recently determined—contrary to the decisions in Oregon, Wisconsin, and Pennsylvania, but consistent with that in Montana—that States may not tax overflights. In the course of holding that nonresident train crews merely passing through the State could not be subjected to tax, the Court relied on the prohibition against a similar tax on overflights:

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[14] The case turned on the Court's determination that flyovers are *not* "in this state" within the meaning of the Montana taxing statute. 720 P.2d at 678. Because the Oregon Supreme Court's determination turned on its directly contrary view—that flyovers *are* "in" the State—the two courts' decisions are plainly in conflict.

> A bank executive from Denver may fly regularly between Denver and Seattle, passing over Idaho on each trip. By the logic of [the DOR,] this executive would be required to pay Idaho income tax while traveling across Idaho. Idaho would apparently have provided this executive with the fruits of its civilization for which it was entitled to payment. No case has been cited that would subject this banker to income taxation by Idaho, *merely because of invasion of our air space. There is no authority for doing so.* [*Blangers* v. *Idaho, Dept. of Taxation*, No. 138 (Idaho Oct. 28, 1988) (LEXIS, States library) (Denying Petition for Rehearing) (emphasis supplied).]

The cases in these five States illustrate several important points. First, notwithstanding this Court's decisions, the State courts are divided over the permissibility of overflight taxes. Second, those taxes are proliferating. And third, as further discussed below, the impact of those taxes in the various States is likely to be quite substantial on the airline industry and those it serves. For these reasons, the Court should grant certiorari to guide the States concerning the permissibility—if any—of such taxes.

III. OVERFLIGHT TAXES WOULD HAVE A SIGNIFICANT IMPACT ON THE AIRLINE INDUSTRY AND THE NATIONAL TRANSPORTATION SYSTEM

A. The State of the Industry

In the 10 years since passage of the Airline Deregulation Act (1978), the airline industry has changed dramatically. As the most recent FAA study demonstrates, from fiscal year 1979 to fiscal 1988, U.S. air carrier activity "has *increased* substantially (up 26.2 percent)," air fares in real dollars "ha[ve] *declined* more than 20.0 percent (2.3 percent annually)" and, primarily due to competitive forces and the introduction of the "hub-and-

spoke" route system, "the traveling public has benefited from *better service* since deregulation . . . ." *FAA Aviation Forecasts—Fiscal Years 1989-2000* (March 1989) ("FAA Report") at 39, 45, 46 (U.S. Dept. of Transportation) (emphasis supplied).

At the same time, the profitability of the industry—and the viability of many individual carriers—has been adversely affected by deregulation. During the 5-year period 1979-1983, owing in part to carriers' "lack of experience in competing in an unregulated market," U.S. carriers posted cumulative operating losses of over $1 billion. FAA Report at 50. Moreover, of the 70 new carriers entering the market since 1979, only 17 survived, and a "number of [the survivors] are in financial trouble." *Id.* at 57.

While the industry's performance began to improve beginning in 1984, "the air industry's rate of return is still below that of other unregulated industries . . . ." *Id.* at 50. Indeed, the most recent figures from the Bureau of Census show that among the 30 largest U.S. industries, air transportation ranks next to last in net profit margin (1.9%). *Statistical Abstract of the United States* at 540 (Department of Commerce, Bureau of Census, Jan. 1989). Furthermore, even these figures are somewhat misleading in that a few larger carriers have "accounted for 85.9 percent of the cumulative operating profits of the entire industry." FAA Report at 50. In contrast, "[m]ost of the [other] carriers, although profitable, have managed to post only meager operating profits over the 10-year period and . . . most have incurred net [overall] losses over the period." *Id.*

B. The Importance of the Industry

Although the economic health of the industry itself is weak but improving,[15] its contribution to the national

[15] For example, while revenue per passenger mile for domestic service declined on a year-over-year basis for 10 consecutive quar-

economy and to the national transportation system is robust and growing. By 1987, 72% of all American adults had flown, and the average number of flights per year for the flying public was 3.4 roundtrips.[16] In fiscal year 1988, the country's 61 domestic commercial scheduled passenger and cargo carriers flew 414.2 million passengers—almost double the country's population.[17] By the year 2000, the FAA projects the number to be nearly 700 million. FAA Report at 76. Furthermore, airlines now account for 92% of all common carrier inter-city travel (air, rail, and bus).[18]

The industry now employs some 480,000 people directly, another 300,000 are employed at airports, in aerospace, and other related industries, and approximately 60,000 more are employed by the federal and State government to oversee and facilitate airline services—for a total of over 800,000 employees with a payroll of nearly $30 billion annually. *The Economic Benefits of Air Transportation* at 1-2. Moreover, these numbers do not include the hundreds of thousands of persons engaged in the travel and tourism industry—which is the country's second largest private employer (after medical[19])—all

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ters—from the fourth quarter 1984 to the first quarter 1987—it began to increase in fiscal year 1988. In real dollars, revenues per mile increased by 5.0 percent from 1987 to 1988 (from 10.07 cents to 10.57 cents). FAA Report at 61.

[16] *The Economic Benefits of Air Transportation* at 6 (Air Transport Association of America, Sept. 1988).

[17] These passengers flew some 330 billion miles domestically in fiscal 1988. FAA Report at 28. In addition, carriers flew some 8.1 billion freight, express, and mail ton miles domestically. FAA Report at 37.

[18] Air Transport Association of America 1989 Annual Report at 7.

[19] *The 1988-89 Economic Review of Travel in America* at 35 (U.S. Travel Data Center 1989).

of whom depend on airline services.[20] Those airline services, furthermore, provide benefits to the country that cannot be quantified, such as greater job mobility; increased business efficiency and productivity; increased access to friends and family, to health and recreation facilities, and to business opportunities; the speedy distribution of mail, industrial raw materials, and finished consumer goods; the overnight delivery of medical supplies, vital organs, bank checks, and time-sensitive documents; and the enhancement of national security.

C. The Industry and Taxes

States and localities currently impose a number of taxes on air carriers, including fuel taxes, sales taxes on aircraft and parts, licensing and registration taxes, landing fees and facility rentals, and property taxes (both on facilities and aircraft). *State Aviation Activity Funding and Aviation Generated Tax Revenue* (National Association of State Aviation Officials, Center for Aviation Research and Education, Sept. 1988). It is estimated that in 1987 alone, user fee payments made by carriers (such as landing fees, rentals, and related assessments) amounted to more than $2 billion. That same year, the carriers paid another $800 million in federal income taxes. In addition, airline employees paid some $4.4 billion in local, State, and federal taxes, while passengers and shippers paid another $4 billion in taxes that went directly to the federal Airport and Airways Trust Fund to fund federal capital and operating expenditures for airport improvements and expansion and the enhancement and operation of the air traffic control system. *The*

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[20] *The Economic Benefits of Air Transportation* at 1. One recent study estimates that when all U.S. jobs attributable to aviation are considered—those in aviation use, aviation provision, and aircraft manufacturing—they add up to 8 million workers who contribute 5.6% of the nation's gross national product. *The Economic Impact of Civil Aviation on the U.S. Economy* at 6-7 (Partnership for Improved Air Travel, June 1989).

Economic Benefits of Air Transportation at 4. This is thus a heavily taxed industry that already pays significant sums for federal and State contributions to aviation.

The threat that significant further taxes will be added to these taxes is a serious concern to these petitioners, particularly for a smaller carrier such as Alaska Air. Its Oregon overflight tax for 1988 alone—more than three-quarters of a million dollars—represented a 200% increase since the year here at issue, an increase due in large part simply to the fact that the carrier increased its flights from Alaska and Washington to California and Arizona (thus creating greater Oregon overflight). Petitioners must assume—as must the airline industry as a whole—that if this Court permits the present Oregon tax to stand, similar taxes will quickly be adopted in other States and localities.[21] The resulting impact on interstate commerce, on the industry, and on consumers would be considerable. Indeed, for an industry whose profit margins are slim already—and in the case of smaller carriers, for whom they are almost non-existent—such an additional tax could be highly injurious. As noted in the Senate Report accompanying the legislation disapproving airport departure taxes, "If the passenger must pay [the] tax, it adds directly to the cost of [the] trip." And even

[21] As Oregon's Assistant Attorney General has acknowledged, "other states and quite a few airlines are keeping an eye on (this case)." *The Business Journal—Portland*, Oct. 31, 1988, Section 1 at 2 (quoting Assistant Attorney General Jerry Bronner). The most recent example of how quickly an air transport tax spreads is the departure tax approved by this Court in 1972. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972). When this Court let that tax stand, there were then (as is true in this case) only five or six jurisdictions with such a tax. During the year after this Court's decision, some 44 jurisdictions had adopted the tax. Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S.38 Before the House Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 64-67 (1973).

if carriers attempt to absorb it, "it will still lead to increased air travel costs" inasmuch as "[t]he airlines could not reasonably be expected to bear such a burden." Accordingly, "[i]n the end, a fare increase would have to be implemented," thereby "mak[ing] air travel uneconomical for some people, and . . . inhibit[ing] the growth of the air transportation system . . . ." S. Rep. No. 12, 93rd Cong., 1st Sess., at 1451 (1973).

Given the serious doubt about the constitutionality of overflight taxes, given the conflict in the lower State courts over the permissibility of such taxes, and given the inevitable, injurious proliferation of such taxes should the present one be permitted to stand, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

(OTC 2496/2497; SC S34859 (Control)/SC S34860)

ALASKA AIRLINES, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

USAIR, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

On appeal from the Oregon Tax Court
The Honorable Carl Byers, Judge

Argued and submitted October 6, 1988

Richard M. Botteri, Portland, argued the cause for appellants. On the brief and reply brief were Robert L. Weiss and James P. Draudt, respectively, and Richard

M. Botteri, and Weiss, DesCamp & Botteri, A Professional Corporation, Portland.

Elizabeth S. Stockdale, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Jerry Bronner, Assistant Attorney General, Salem.

Before Peterson, Chief Justice, and Linde, Campbell,* Carson, Jones, Gillette, Justices, and Van Hoomissen, Justice, pro tempore.

CARSON, J.

The decision of the Oregon Tax Court is affirmed.

[Filed February 22, 1989]

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* Campbell, Justice, retired December 31, 1988.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Case Name: *Alaska Airlines v. Department of Revenue*

Appellate case number: SC S34859 (Control) SC S34860

Trial Court or agency case number: OTC 2496/2497

Prevailing party or parties: Respondent

[ ] No costs awarded

[X] Costs awarded to the prevailing party or parties, payable by: Appellants

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FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $______, and attorney fees in the amount of $______. (ORAP 11.03, 11.05, and 11.10).

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $______ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Dated: SUPREME COURT

[SEAL]

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* This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03. *See also* ORS 19.190(1).

CARSON, J.

Alaska Airlines, Inc. (Alaska), and Pacific Southwest Airlines, Inc. (PSA),[1] appeal a decision of the Oregon Tax Court upholding 1986 property tax assessments determined, in part, on the basis of time spent in the air by aircraft that flew over, but did not land in, Oregon.[2]

In 1986, Alaska and PSA were so-called "regional airlines" qualified to do business in Oregon. Each operated commercial airline service in western states, including Oregon, Washington and California. Alaska scheduled flights that landed in and departed from the Portland International Airport, whereas PSA operated aircraft that flew into and out of Portland, Eugene, Medford and Redmond. Forty-nine employees worked in Alaska's Oregon facilities, and 74 employees worked in PSA's Oregon facilities. For each airline these employees represented about 1 percent of its total work force. Each airline maintained its corporate headquarters, flight-training facility, major repair facility and base-maintenance facilities in states other than Oregon. Each was incorporated in a state other than Oregon.

Alaska and PSA also operated flights that originated from cities outside Oregon and that flew over Oregon, without landing, to destinations in other states, *e.g.*, nonstop from Seattle to Los Angeles. These flights, called "overflights," represented 45 to 49 percent of each airline's total flight time over Oregon. As might be expected, overflights involved little contact with ground facilities, and the State of Oregon did not provide regular service to overflights. Regular government service to overflights

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[1] As the result of a merger occurring on April 9, 1988, USAir, Inc. has been substituted as the real party in interest for Pacific Southwest Airlines, Inc. In the interests of consistency with the proceedings below, we refer to appellant as Pacific Southwest Airlines, Inc. (PSA).

[2] The appeals of Alaska Airlines, Inc. and Pacific Southwest Airlines, Inc. were consolidated by order of this court dated April 11, 1988.

only occurred through radio communication with and radar tracking by air traffic controllers of the Federal Aviation Administration.

For ad valorem property tax purposes, the Department of Revenue (Department) is required to assess certain designated utilities and companies, including airlines, and to apportion the assessment among qualifying Oregon counties. ORS 308.505 to 308.660. By statute, the Department is permitted to value the airlines' property, both within and without Oregon, as a unit. ORS 308.555. It then must apportion a "fair" amount of the unit value to Oregon. *Southern Pacific Trans. Co. v. Dept. of Rev.*, 302 Or 582, 585, 732 P2d 18 (1987).

Alaska's and PSA's properties consisted of non-mobile (ground) and mobile (aircraft) properties constituting the total system properties of the airlines. The Department allocated to Oregon portions of the values of the total system properties of the airlines to determine each airline's 1986 property tax assessment. According to the airlines, allocating these portions involved the following steps:

First, the Department allocated to Oregon a portion of the value of each airline's ground property. These amounted to $204,000 and $687,000 for Alaska and PSA, respectively. These allocations and the method by which they were determined are not at issue.

Second, the Department allocated to Oregon a portion of the value of each airline's aircraft property. To determine these portions, the Department used the following formula:

$$\text{Allocation Percent} = \frac{\text{OR Ground} + \text{OR Flight} + \text{OR Flyover}}{\text{Total System Hours}}$$

OR Ground	= Oregon ground time
OR Flight	= Oregon flight time for aircraft landing in and departing from Oregon
OR Flyover	= Flyover time for overflights
Total System Hours	= All system flight and ground time wherever generated

"OR Ground," as the name suggests, represented the amount of time that aircraft spent on the ground in Oregon and was calculated as a standard one-half hour for each flight. "OR Flight" and "OR Flyover" represented flight time for aircraft that flew within the borders of Oregon "equated" to the type of aircraft flown. "OR Ground" also was "equated." "Equating" involved, in effect, crediting to more valuable aircraft additional time over that actually spent in the air or on the ground.[3] The Department then derived the "Allocation Percent" for each airline's aircraft property by dividing the product of "OR Ground," "OR Flight" and "OR Flyover" by each airline's "Total System Hours," which simply represented all "equated" flight and ground time throughout each airline's system.

The Department next took the percentage that the value of each airline's aircraft property represented to the total system value of each airline. That figure was 81.8 percent for Alaska and 88.07 percent for PSA. It multiplied this percentage by the "Allocation Percent" derived through use of the formula above—5.3718 percent for Alaska and 3.5011 percent for PSA. The resulting product was multiplied by the total system value of each airline to allocate to Oregon a portion of the value of each airline's aircraft property—$21,091,000 for Alaska and $25,439,000 for PSA. These were added to the ground property allocations to determine the 1986 property tax assessments.

Alaska and PSA argue that the Department's method of allocating aircraft property resulted in invalid tax

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[3] The following example illustrates "equating." Among its various aircraft Alaska operated the B727-200 and the MD-83. The MD-83 was worth 2.47543 times what the B727-200 was worth and so was assigned an "equating factor" of 2.47543. The "equating factor" assigned to the B727-200 was 1.0000. An hour "equated" for an MD-83 thus became 2.47543 "equated" hours; an hour "equated" for a B727-200 remained one hour, but "equated."

assessments. They specifically object to the use of overflight time to determine a portion of the value of aircraft property. Phrased in terms of the above formula, they argue that the Department should not have included "OR Flyover" in the numerator. They argue that the Department's formula violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution and ORS 308.550(2).[4]

The Tax Court did not agree. *Alaska Airlines v. Dept. of Rev.*, 10 OTR 518 (1987). We discuss, in turn, each of the airlines' arguments and affirm for the reasons set forth below.[5]

I. DUE PROCESS

Alaska and PSA argue that the State of Oregon did not confer protection, opportunities or benefits on overflights. They argue that overflights did not generate revenue, use public facilities or cause commerce to be conducted in this state. They contend that "alleged benefits," including search and rescue services[6] and criminal law protection,[7] were "too nebulous and speculative to justify

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[4] Alaska and PSA also raise an argument based on Article I, section 32, of the Oregon Constitution (uniformity of taxation). They failed to raise this argument in the Tax Court, however. We decline to address the issue. *Leiser v. Sparkman*, 281 Or 119, 122, 573 P2d 1247 (1978).

To the extent that plaintiffs raise a separate statutory issue of situs under ORS 308.515 and 308.550(2), we likewise do not consider this assertion because it was not raised to the Tax Court.

[5] Because the airlines' statutory argument concerns a statute codifying constitutional standards, we first address those constitutional standards.

[6] *See* ORS chapter 401 and 491.190.

[7] *See* ORS 131.205 and 131.215(1). *See also* ORS 493.160 and 493.991(2) (prohibiting operation of aircraft recklessly or while under influence of drugs), which may afford some protection to commercial aircraft.

the taxation of overflights." In short, Alaska and PSA focus exclusively on overflights—they argue that overflights did not have a connection to or contact with this state sufficient to justify a tax under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[8]

This premise—that the Department assessed taxes against overflights—is the fly in the airlines' ointment. The Department did not assess overflights or specific aircraft; the Department assessed each airline's aircraft property based on a formula reflecting (in part) time spent in the air by that aircraft. The validity of each airline's tax assessment does not depend upon whether the state could have assessed a tax against overflights—the state did not do so. Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit.

Alaska's and PSA's aircraft properties constituted integrated enterprises whose business was to transport passengers and cargo between cities in western states. These enterprises conducted operations into and out of Oregon airports, with each enterprise having regular contact with this state through aircraft landings, departures, boarding and deplaning of passengers and loading and unloading of cargo. They enjoyed the benefits and protection of Oregon criminal laws, the provision of search and rescue services if needed and opportunities for further commerce through contacts with Oregon. Alaska's and PSA's aircraft properties functioned as units with sufficient contact with this state to sustain the power of the state to levy an apportioned ad valorem tax.

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[8] Amendment XIV, section 1, of the United States Constitution (the Due Process Clause) provides, in part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

Braniff Airways v. Nebraska Board, 347 US 590, 600-02, 74 S Ct 757, 98 L Ed 967 (1954).

Although the units of the airlines' aircraft properties thus had situs in Oregon, the Due Process Clause also required that the Department fairly apportion the units. The state may not tax extraterritorial value. *Norfolk & W.R. Co. v. Tax Comm'n.*, 390 US 317, 324-25, 88 S Ct 995, 19 L Ed 2d 1201 (1968); *Southern Pacific Trans. Co. v. Dept. of Rev., supra*, 302 Or at 588-89. The question remains whether overflight time could be used to apportion Alaska's and PSA's aircraft properties.

Whether an overflight occurs "in" a state has not before been raised under the Due Process Clause. *But cf. State v. Northwest Airlines*, 213 Minn 395, 7 NW2d 691 (1942), *aff'd sub nom Northwest Airlines v. Minnesota*, 322 US 292, 64 S Ct 950, 88 L Ed 1283 (1944) and *Northwest Airlines v. State Tax Appeal Bd.*, 720 P2d 676 (Mont 1986). Nevertheless, the question is not difficult. A formula apportioning aircraft property on the basis of time spent in the air or on the ground is analogous to a formula apportioning railroad rolling stock on the basis of miles of track. *See Norfolk & W.R. Co. v. Tax Comm'n., supra.* Just as rolling stock moves from state to state, requiring reference to fixed, quantifiable factors such as miles of track for apportionment purposes, so too do aircraft used in interstate transportation require reference to quantifiable factors. Time is such a factor, and the airlines do not object to a formula apportioning on the basis of time when restricted to aircraft that landed at or departed from an Oregon airport.

But aircraft are, of course, different from rolling stock. Rolling stock and railroad track touch the ground, but aircraft in flight, obviously, do not. Overflight aircraft did not touch the ground in Oregon *at all*—and hence the airlines' argument that overflight time did not occur "in" this state for purposes of the 1986 tax assessments.

This argument, however facially appealing, does not persuade. It has, to paraphrase Justice Hugo L. Black on a different matter, a superficial plausibility that cloaks a lack of substance. *See United States v. Wallace Co.*, 336 US 793, 799, 69 S Ct 824, 93 L Ed 1042 (1949). Alaska and PSA concede that air time of aircraft landing at or departing from Oregon airports could have been included in the numerator of the Department's apportionment formula (so-called "ramp to ramp" time). They concede that such time could have been used to apportion aircraft property. But their premise—that overflights did not occur "in" this state—and their conclusion—that overflight time could not have been used to apportion aircraft—lead to an anomaly. The airlines do not explain how what was indistinguishable when it occurred—ramp to ramp time and overflight time were both, by definition, time spent in the skies above this state—became distinguishable because ramp to ramp aircraft landed at or departed from this state.

Alaska and PSA also do not explain where an overflight was if not "in" this state while traveling within the borders of this state. "In" would seem to be the answer because the airlines concede (as they must) the applicability of Oregon criminal law to overflights. Although Alaska and PSA argue that the value represented by an overflight should have been taxed to the domiciliary state, that argument does not address whether the overflight was "in" this state for purposes of apportioning aircraft property.

We conclude that the Department properly included overflight time in the numerator of the apportionment formula. Each airline's aircraft property, considered as a unit, had situs in this state. Moreover, inclusion of overflight time to apportion aircraft property did not tax extraterritorial value. For apportionment purposes, an overflight was "in" this state.

II. COMMERCE CLAUSE

The United States Supreme Court stated the test for the validity of a state tax under the Commerce Clause in *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326 (1977).[9] A state tax does not offend the Commerce Clause when the tax is: (1) Applied to an activity with a "substantial nexus" with the taxing state; (2) fairly apportioned; (3) nondiscriminatory against interstate commerce; and (4) fairly related to services provided by the state. *Complete Auto Transit, Inc. v. Brady, supra*, 430 US at 279; *see also Budget Rent-A-Car v. Multnomah Co.*, 287 Or 93, 104-05, 597 P2d 1232 (1979). This test for determining whether a tax is valid under the Commerce Clause is similar to the test for determining whether a tax is valid under the Due Process Clause. *See Norfolk & W.R. Co. v. Tax Comm'n., supra*, 390 US at 323-25; *Southern Pacific Trans. Co. v. Dept. of Rev., supra*, 302 Or at 588. Alaska and PSA argue that the 1986 taxes were not applied to activities with a substantial nexus with this state, fairly apportioned or fairly related to services provided by this state.

Substantial Nexus

For a substantial nexus to exist, there must be "some definite link, some minimum connection," between the taxing state and the taxed activity.[10] *Nat. Bellas Hess*

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[9] Article I, section 8, clause 3, of the United States Constitution provides, in part, that "Congress shall have Power * * * [to] regulate Commerce * * * among the several States."

[10] The overlap between the Due Process and Commerce Clauses is most manifest in the "substantial nexus" requirement of the latter. Professor Tribe writes:

> "* * * The degree of 'connection,' 'contact,' or 'nexus' between the taxing state and the interstate commerce taxed is also the fundamental measure of whether or not a state tax vio-

v. Dept. of Revenue, 386 US 753, 756, 87 S Ct 1389, 18 L Ed 2d 505 (1967) (quoting *Miller Bros. Co. v. Maryland*, 347 US 340, 344-45, 74 S Ct 535, 98 L Ed 744 (1954)). As they did in arguing under the Due Process Clause, the airlines try to shift the focus to the view that the state taxed overflights rather than the units of which overflights were parts.

In *Adams Express Company v. Ohio*, 165 US 194, 17 S Ct 305, 41 L Ed 683 (1987), the U.S. Supreme Court recognized that under the Commerce Clause a state may value as a unit an integrated business enterprise operating in interstate commerce. In *Adams Express*, the property was personal and not physically connected, yet it was used in concert to carry on the interstate commerce of the express company. The Court looked to a "unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business." *Adams Express Company v. Ohio*, *supra*, 165 US at 222.

Alaska's and PSA's aircraft properties functioned as did the property of the express company in *Adams Express*. Each airline's aircraft property comprised part of a "unity of use"—the business of transporting passengers and cargo—and so was used in an integrated and coordinated manner to carry on interstate commerce. The consequence must be as it was in *Adams Express*—the activities of the airlines' units of aircraft properties established the substantial nexuses required under the Commerce Clause.

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lates the commerce and due process clauses. * * * [T]o the extent that a state can point to a substantial connection with a particular aspect of interstate commerce, it can also demonstrate that its program is consistent with the commerce and due process clauses." L.H. Tribe, *American Constitutional Law* 446 (2d ed 1988).

Fair Apportionment

The Commerce Clause requires that an apportionment formula bear a rational relationship, both on its face and as applied, to property values connected with the taxing state. *Norfolk & W.R. Co. v. Tax Comm'n, supra,* 390 US at 325. A state may not tax an activity carried on outside its borders. *See Complete Auto Transit, Inc. v. Brady, supra,* 430 US at 282 (quoting *Memphis Gas Co. v. Stone,* 335 US 80, 96-97, 68 S Ct 1475, 92 L Ed 1832 (1948) (Rutledge, J., concurring)); *Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 589 (state may not tax extraterritorial value). The airlines again characterize the taxes as, in part, taxes assessed against overflights—and they again mischaracterize the taxes.

The Department assessed portions of the values of the airlines' aircraft properties. Aircraft were on the ground or in the air at any given time; the Department's formula reflected this fact. More precisely, the formula reflected that portion of time that each airline's aircraft property spent on the ground or in the air *in Oregon.* This was a fair manner of determining the extent of each airline's aircraft activity in Oregon, and it was a fair manner of apportioning property based on the presence of each airline's aircraft.

Alaska and PSA argue, however, that the formula resulted in values wildly at odds with values that might have been achieved by formulas used to apportion in seven other western states. These formulas did not include overflight time in their numerators. The airlines draw the conclusion that these formulas showed "a uniform practice contrary to Oregon's," thus rendering the Department's formula suspect under the Commerce Clause.

Although there is merit in the airlines' argument, *see Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 589 (commerce clause may require apportionment formula not substantially different from formulas used

by other states), the airlines tell an incomplete story. The ultimate test is whether the taxing state itself apportions fairly. *Id.* The seven other western states might have failed to apportion to themselves full values consistent with the Commerce Clause. Because the Department's formula resulted in fair apportionment of the values of the airlines' aircraft properties, the use of different formulas by other states was not in itself reason for this state to have changed its apportionment practice.

Phrased in terms of the "internal and external consistency tests" of the U.S. Supreme Court, *see, e.g., Goldberg v. Sweet*, 1989 US LEXIS 308, the formula used by the Department complied with the fair apportionment requirement of the Commerce Clause. The formula was internally consistent because, were every state to have used it, no multiple taxation would have resulted—only 100 percent of aircraft value would have been taxed. Moreover, it was externally consistent because it reflected only in-Oregon aircraft activity.

Fair Relation to Services Provided

The inquiry into whether a tax bears a fair relationship to services provided by the taxing state is similar to the inquiry into whether the tax was assessed against an activity with a substantial nexus with the state. *Commonwealth Edison Co. v. Montana*, 453 US 609, 625-26, 101 S Ct 2946, 69 L Ed 2d 884 (1981); *see also Budget Rent-A-Car v. Multnomah Co., supra*, 287 Or at 105 n 6. This fourth prong of the *Complete Auto Transit* test, however, imposes the additional limitation that "the *measure* of the tax must be reasonably related to the extent of the contact [with the taxing state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Commonwealth Edison Co. v. Montana, supra*, 453 US at 626. (Emphasis in original.) (Citations omitted.) The tax must be assessed in proportion to benefits, opportunities and protection conferred or

afforded by the taxing state, but it need not be assessed only as *compensation* for services provided. *Id.* at 622-24. The Commerce Clause does not demand that a state tax only on the basis of *quid pro quo. See Budget Rent-A-Car v. Multnomah Co., supra,* 287 Or at 105 n 6.

The Department assessed Alaska and PSA based on the presence, as reflected in air and ground time, of aircraft property in this state. The taxes were proportioned to the extent of the activities of the airlines' units of aircraft properties within this state. While engaging in these activities, the airlines enjoyed benefits, opportunities and protection conferred or afforded by this state—search and rescue services, opportunities for further commerce and the protection of Oregon criminal laws—and so could be made to bear a "just share of state tax burden." The taxes were fairly related to services provided by this state.

We conclude that the Department's inclusion of overflight time in the numerator of its apportionment formula did not violate the Commerce Clause.

III. STATUTORY ISSUE

ORS 308.550(2)[11] requires the Department to use a "reasonable method" when it uses an apportionment method other than that prescribed by ORS 308.550(1). Alaska and PSA argue that the Department did not use a reasonable method.

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[11] ORS 308.550(2) provides:

> "If the value of any property having a situs in this state, of a company operating both within and without the state, cannot fairly be determined in the manner prescribed in subsection (1) of this section, the department may use any other reasonable method to determine the proper proportion of the entire property assessable for taxation in this state."

ORS 308.550(2) has not been changed since its enactment in Oregon Laws 1955, chapter 735, section 2.

The "reasonable method" requirement of ORS 308.550(2) codifies Due Process and Commerce Clause standards. *Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 588. An apportionment formula that complies with these standards complies with the requirement that the Department use a reasonable method in apportioning property. Because the Department's formula complied with the federal constitutional standards, it complied with ORS 308.550(2).

The decision of the Tax Court is affirmed.

APPENDIX B

IN THE OREGON TAX COURT

Property Tax

No. 2496

ALASKA AIRLINES, INC.,
Plaintiff,
v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

No. 2497

PACIFIC SOUTHWEST AIRLINES, INC.,
Plaintiff,
v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

OPINION

Plaintiffs, incorporated and headquartered in other states, are airlines qualified to do business in Oregon. In conducting their businesses, plaintiffs utilize both mobile (primarily airplanes) and nonmobile transportation property. Plaintiffs do not question the taxation of their nonmobile property located in Oregon. This appeal pertains only to property taxes attributable to plaintiffs' mobile property. Although not formally consolidated, the

parties agreed for the sake of convenience and efficiency that these cases be tried, briefed and decided together.

By statute, defendant is required to assess plaintiffs' property for ad valorem taxation.

> "(1) The Department of Revenue shall make an annual assessment * * * of the following property having a situs in this state:
>
> "(a) * * * any property used or held for its own future use by any company in performing or maintaining any of the following businesses or services * * * : * * * air transportation using aircraft * * * for scheduled air service; * * *." (ORS 308.515)

Because plaintiffs operate both within and without Oregon, defendant valued plaintiffs' property under ORS 308.550(2) using a formula which apportions a part of plaintiffs' property to Oregon. ORS 308.550(2) provides:

> (2) "If the value of any property having a situs in this state, of a company operating both within and without the state, cannot fairly be determined in the manner prescribed in subsection (1) of this section, the department may use any other reasonable method to determine the proper proportion of the entire property assessable for taxation in this state."

The method defendant chose in this case was to apply a single-factor formula (time) composed of three elements: Ground time, flight time (for aircraft landing and departing Oregon) and fly-over time (for aircraft which fly over Oregon but do not touch down).

Plaintiffs do not dispute that their operations in Oregon are taxable, nor do they dispute use of the time-factor formula based on the ground time and flight time elements. What plaintiffs do dispute is the inclusion of fly-over time in the numerator of the formula. Plaintiffs' claim that inclusion of fly-over time in the numerator is contrary to the "reasonable" requirement of the statute

and violates the Due Process Clause and the Commerce Clause of the United States Constitution.[1]

The cases which chronicle the history of taxation of businesses operating interstate are numerous and not always consistent. Although the United States Supreme Court has applied the Due Process Clause and the Commerce Clause with overlapping requirements in some cases, they are not the same. Privilege and income taxes need to satisfy the "nexus" test of the Due Process Clause but property taxes can only be imposed on property which has "situs" in the taxing state. Further, in the area of property taxation, it is necessary to distinguish cases where the issue is the amount of property taxable as opposed to the value of the property taxable. *Adams Express Co. v. Ohio State Auditor*, 165 US 194, 17 S Ct 305, 41 L Ed 683 (1897).

Consequently, it is necessary to relate the language of the cases to the underlying tax concepts.[2] For example, plaintiff cites *Wisconsin v. J. C. Penney Co.*, 311 US 435, 444, 61 S Ct 246, 85 L Ed 267 (1940), for the proposition that the tax must bear "fiscal relation to protection, opportunities and benefits given by the state." Plaintiff argues that: "It is clear that it is the degree of presence for commercial purposes and the substance of the contacts which give rise to taxability." (Plaintiff's Post Trial Memorandum, at 14). While plaintiffs' argument and its quotation of the court are appropriate to that case, which was a privilege tax case, such may be

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[1] The statutory standard of "any other reasonable method" is implicitly controlled by the constitutional standards. The court is unable to visualize a method which would meet the constitutional requirements but would be otherwise considered unreasonable.

[2] As Justice Douglas pointed out in his concurring opinion in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953):

> "What might be an adequate formula for a gross receipts tax might be inadequate for an ad valorem tax."

somewhat misleading as to a property tax case. If property is located in a state, it is subject to taxation regardless of whether it is used for commercial purposes or used at all. Jurisdiction to tax property is not a function of its use but of its location.

Defendant's citation of *Communication Satellite Corp. v. Franchise Tax Board*, 156 Cal App 3d 726, 203 Cal Rptr 779 (1984), which was an income tax case, is likewise of little benefit in this case. Looking to an income tax case for guidance, either in terminology or tests, may be misleading for a property tax case.

Commerce Clause

The fundamental basis for taxing plaintiffs' property was explained by Justice Douglas in his concurring opinion in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953), where he stated:

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. *Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.*" (Emphasis supplied.)

Or, as stated in *Johnson Oil Refinery Co. v. Oklahoma*, 290 US 158, 162, 54 S Ct 152, 78 L Ed 238 (1933):

> "The basis of the jurisdiction is the habitual employment of the property within the State."

For the ad valorem tax, the test under the Commerce Clause is simple. As stated by the United States Supreme Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 US 169, 173, 69 S Ct 931, 93 L Ed 585, 589 (1948):

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' [Citing *Nashville, C and St. L. R. Co. v. Browning*, 310 US 362, 365, 84 L Ed 1254, 1255, 60 S Ct. 968.]"

Or, as stated in the negative:

> "A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise to 'project the taxing power of the state plainly beyond its borders.'" *Norfolk and Western R. Co. v. Missouri Tax Com.*, 390 US 317, 88 S Ct 995, 19 L Ed 1201 (1968).

Thus the test under the Commerce Clause is whether the formula employed by the defendant fixes a reasonable fraction of plaintiffs' mobile property as being situated in the State of Oregon by virtue of its habitual employment in the state.

In *Ott v. Mississippi Valley Barge Line Co., supra*, Louisiana and the City of New Orleans levied ad valorem taxes on the plaintiff's barges which transported freight interstate via the Mississippi and Ohio Rivers. The formula for apportioning the ad valorem tax was the ratio between the number of miles in Louisiana and the total number of miles in the system. In upholding the tax, the court found no difference between water vessels and railroad cars as far as applying the Due Process Clause or the Commerce Clause. Later, the court in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953), found that:

> "A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats." (At 600.)

This court likewise finds no logical distinction between boats which ply Oregon's navigable inland waters, over which the federal government has jurisdiction, and airplanes which fly the skies of Oregon, over which the federal government has jurisdiction. In both cases, the state's power to tax is not displaced by the federal government's power to regulate. Regulation does not remove the property from the presence of the state.[3] The court finds that the inclusion of the fly-over time in the formula is reasonable. Application of the formula does not allocate to Oregon property which is outside its borders. The purpose of the formula is to measure that portion of plaintiffs' property which is habitually employed within the state. If the formula is accurate, "freezing" plaintiffs' operations at an average instant on a typical day would find approximately the same proportion of property in Oregon as indicated by the formula.

Plaintiffs argue that use of the fly-over element in the numerator is not appropriate because plaintiffs' airplanes which merely fly over have no contact with and receive no benefits from the state. If this were true, then the fly-over factor should not be included in either the denominator or the numerator. If it is not relevant to determine the presence of property for tax purposes, its relevance is not affected by the fact that plaintiff may wish to use it in the denominator.

The court acknowledges the point made by Justice Frankfurter in his dissent in *Braniff* that while one state's formula may be reasonable, the uncoordinated cumulative effect of different reasonable formulas of many states may impose an undue burden on interstate com-

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[3] In so deciding, the court is assuming that plaintiffs' airplanes fly low enough to be in Oregon airspace as opposed to being in outerspace. As technology changes, undoubtedly an issue which must be decided in the future is where air ends and space begins. *See,* for example, Arnold Duncan McNair, *The Law of the Air,* (3d ed 1964).

merce. Plaintiff argues strenuously that defendant's position erroneously assumes all states use the same formula and fails to recognize that the state of domicile may tax all unapportioned property. This court is in no better position than was the Supreme Court in *Braniff* to determine whether in fact there is any danger of plaintiffs being subject to double taxation. It is clear, however, that the domiciliary state cannot tax the full value of property located only part of the time in that state. *Standard Oil Co. v. Peck*, 342 US 382, 72 S Ct 309, 96 L Ed 427 (1952). If plaintiffs' airplanes are habitually employed in other states, which would appear to be the case for regularly scheduled airlines, plaintiffs should be able to avoid the undue burden they fear.

Due Process

The Fourteenth Amendment of the United States Constitution prohibits depriving a person of property without due process. As applied to taxation, the law assumes that the quid pro quo for the tax taken by government are the benefits received. The tax burden, when compared with the benefits, may fall unequally upon taxpayers.

> "This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road." *Union Refrigerator Transit Co. v. Kentucky*, 199 US 194, 203, 26 S Ct 36, 50 L Ed 199 (1905).

> "Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services pro-

vided to the activity. Instead, our consistent rule has been:

"Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.'" *Commonwealth Edison Co. v. Montana*, 453 US 609, 622, 101 S Ct 2946, 69 L Ed 2d 884 (1981).

Thus the basic test of the Due Process Clause may be phrased as follows:

"The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.*, 311 US 435, 444, 61 S Ct 246, 85 L Ed 267 (1940).

There can be no question that Oregon affords plaintiffs substantial benefits as to its airplanes which land and depart from Oregon. The question is whether plaintiffs' fly-overs receive any benefit that would justify the inclusion of that element in the apportionment formula.[4] The court believes the answer to this question is affirmative. Oregon's criminal laws and its enforcement of those laws extends into the skies as well as upon the waterways and the land. Defendant points out that Oregon provides funds for search and rescue at no cost to the airlines if

[4] Although defendant disclaims that the tax is being imposed on the fly-over planes, that is precisely the effect of including them in the formula.

a plane were to go down. Theoretically, however, it is not necessary to find specific benefits for the fly-over planes only. The benefits received by plaintiffs' operations which touch down in Oregon are sufficiently great to extend to all of plaintiffs' property in Oregon under the "benefits of civilization" test.

The court finds that inclusion of the fly-over time element in the apportionment formula is a "reasonable method" to apportion plaintiffs' property for taxation in Oregon. The court further finds that the formula meets the requirements of the Commerce Clause by determining an appropriate fraction of plaintiffs' property that is habitually employed within the state and also meets the requirements of the Due Process Clause by providing broad scope benefits directly and indirectly to plaintiffs and their properties. Judgment will be entered in each case consistent with this opinion. Costs to neither party.

Dated this 14th day of December, 1987.

/s/ Carl H. Byers
Judge

APPENDIX C

STATE OF OREGON
DEPARTMENT OF REVENUE

No. A&AU-86-24

IN THE MATTER OF THE PETITION OF

ALASKA AIRLINES, INC.

for Review of its True Cash Value
Assessment for the Year 1986.

OPINION AND ORDER

Alaska Airlines, Inc. appealed to the Department of Revenue for a reduction of the property tax assessment as of January 1, 1986 on its properties assessable by the Department.

I held a hearing at the Department of Revenue office in Salem, Oregon on June 27, 1986. Korbey Hunt, Properties Manager, represented the company. The Department staff was represented by Rudy Bischof and Ed Gerhardus.

The petition requested the system value be lowered from $480,000,000 to $310,000,000. Mr. Hunt explained that this was a figure based on estimates made for budget purposes and was not based on an appraisal. Mr. Hunt also raised questions on the handling of aircraft leased to others and the rounding upward of the leased aircraft cost indicators.

The main issue was the inclusion of fly-over time in the allocation factor. Mr. Hunt stated that the use of fly-

over time is unfair to Alaska Airlines because they receive no benefits from this taxation. He presented several documents relating to laws and legal decisions. He also submitted an allocation calculation which excluded fly-over time.

I have reviewed this information and have concluded that the present allocation method is reasonable. I also approve the system value at $480,000,000.

NOW, THEREFORE, in the matter of the appeal of Alaska Airlines, Inc. for a reduction in true cash value as of January 1, 1986, on its properties assessable by the Department of Revenue, it is

ORDERED that the true cash value of said property as of January 1, 1986, of $21,295,000 is sustained.

Done at Salem, Oregon, this 8th day of July, 1986.

DEPARTMENT OF REVENUE

/s/ Robert Getz

NOTICE: If you are dissatisfied with this decision, you may appeal it to the Oregon Tax Court, 520 Justice Building, Salem, Oregon 97310, within 60 days of the date of mailing shown above. ORS 305.560.

STATE OF OREGON
DEPARTMENT OF REVENUE

No. A&AU-86-25

IN THE MATTER OF THE PETITION OF

PACIFIC SOUTHWEST AIRLINES

for Review of its True Cash Value
Assessment for the Year 1986.

OPINION AND ORDER

Pacific Southwest Airlines appealed to the Department of Revenue for a reduction of the property tax assessment as of January 1, 1986, on its properties assessable by the Department.

I held a hearing at the Department of Revenue office in Salem, Oregon on June 26, 1986. The company was represented by Jeffrey Peterson and Denise Smith. The Department staff was represented by Rudy Bischof and Ed Gerhardus.

The staff recommended reducing the Oregon true cash value due to computation errors. I agree with that recommendation.

Mr. Peterson raised the issue of the inclusion of fly-over time in the Oregon allocation factor. He contended that using fly-over time is unfair to PSA because it represents paying taxes for benefits which are not received. In addition, it is discriminatory in that some airlines which never land in Oregon do not pay taxes when their planes fly over the state. Mr. Peterson submitted several

alternative calculations for determining an allocation factor. I have reviewed this information and have concluded that the present allocation method is reasonable.

NOW, THEREFORE, in the matter of the appeal of Pacific Southwest Airlines for a reduction by the Department of Revenue, it is

ORDERED that the true cash value of said property as of January 1, 1986, is reduced from $26,797,000 to $26,126,000.

Done at Salem Oregon, this 8th day of July, 1986.

DEPARTMENT OF REVENUE

/s/ Robert Getz

NOTICE: If you are dissatisfied with this decision, you may appeal it to the Oregon Tax Court, 520 Justice Building, Salem, Oregon 97310, within 60 days of the date of mailing shown above. ORS 305.560.

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OREGON

ALASKA AIRLINES, INC.,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

USAIR, INC.,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

(OTC 2496/2497; SC S34859 (Control)/SC S34860)
On Appeal from the Oregon Tax Court
The Honorable Carl Byers, Judge

Argued and submitted October 6, 1988

APPELLATE JUDGMENT

Richard M. Botteri, Portland, argued the cause for appellants. On the brief and reply brief were Robert L. Weiss and James P. Draudt, respectively, and Richard M. Botteri, and Weiss, DesCamp & Botteri, A Professional Corporation, Portland.

Elizabeth S. Stockdale, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Jerry Bronner, Assistant Attorney General, Salem.

Before Peterson, Chief Justice, and Linde, Campbell,* Carson, Jones, Gillette, Justices, and Van Hoomissen, Justice, pro tempore.

CARSON, J.

The decision of the Oregon Tax Court is affirmed.

[Filed February 22, 1989]

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Case Name: *Alaska Airlines v. Department of Revenue*

Appellate case number: SC S34859 (Control) SC S34860

Trial Court or agency case number: OTC 2496/2497

Prevailing party or parties: Respondent

[ ] No costs awarded

[X] Costs awarded to the prevailing party or parties, payable by: Appellants

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* Campbell, Justice, retired December 31, 1988.

FINAL ORDER *

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from Appellants costs and disbursements taxed at $145, and attorney fees in the amount of $——. (ORAP 11.03, 11.05, and 11.103).

Dated: May 1, 1989

SUPREME COURT
[SEAL]

* This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03. *See also* ORS 19.190(1).

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-21

ALASKA AIRLINE, INC. and USAIR, INC.,
Petitioner

v.

DEPARTMENT OF REVENUE OF OREGON

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 29, 1989.

/s/ Sandra Day O'Connor
SANDRA DAY O'CONNOR
Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of July, 1989.

(2)

No. 89-346

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALASKA AIRLINES, INC. and
USAir, Inc.,

Petitioners,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OREGON SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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2 HP

QUESTION PRESENTED

Does either the Commerce Clause or the Due Process Clause preclude a state in which an interstate airline owns property from using the flight time of airplanes that do not land in the state, as well as the flight time of those that do, in determining the portion of that airline's property located in the state?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, the Department of Revenue of the State of Oregon (DOR), accepts, as adequate for review, petitioners' statement of the opinions below, jurisdiction and constitutional provisions involved. DOR accepts petitioners' statement of the case with the exception of the first sentence, which suggests that DOR taxes interstate aircraft merely because they have flown over Oregon. The reasons for DOR's disagreement with that suggestion are set out in detail below.

REASONS FOR DENYING CERTIORARI

Petitioners assert this case presents three issues that make it worthy of this Court's attention. First, they contend the Oregon taxing formula considers property with no nexus to the state. Second, they assert the existence of a conflict among the state courts that have considered the issue. Finally, they claim that failure to strike down Oregon's formula will have an adverse financial impact on the airline industry. None of these contentions withstands analysis.

The issue of the existence or extent of a nexus—the issue on which the airlines lay the most stress—is not presented by this case at all. Rather, the case presents solely a question of fair apportionment of the mobile property of interstate airlines having an acknowledged nexus with Oregon. The airlines' claim of a conflict among the states is no more substantial. Like the first argument, it depends on the airlines' erroneous focus on nexus. Neither of the two decisions on which the airlines rely considered the question presented by the facts of this case. Finally, the claim that the Oregon formula will increase the airlines' overall tax burden depends on the erroneous assumption that the value Oregon currently reaches by the application of that formula would otherwise be untaxable by any state. This argument is contradicted by petitioners' own claim that the Oregon formula will subject them to double taxation and is incorrect in light of this Court's

decisions. Properly viewed, the case involves nothing more than a fact-specific application of this Court's settled principles. It does not present any significant legal issue meriting the Court's attention.

I. OREGON'S SYSTEM OF APPORTIONING THE VALUE OF AIRLINE MOBILE PROPERTY DOES NOT VIOLATE EITHER THE COMMERCE OR DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioners, Alaska Airlines, Inc. and USAir, Inc., are airlines regularly doing business in the State of Oregon. In the course of conducting that regular business, as the airlines do not dispute, they own and use property in Oregon subject to ad valorem property taxation. To assess the amount of ad valorem tax these interstate corporations must pay to Oregon, DOR first determines the entire value of the airlines' property, both fixed and mobile, as a unit. Or. Rev. Stat. § 308.555 (1987). *See Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897).[1] DOR then determines what percentage of petitioners' property is located in Oregon. DOR allocates that percentage of the unit of each petitioners' property to Oregon and applies its standard ad valorem property tax rates to that apportioned percentage of the corporation's unit value.[2]

A state property tax on an interstate enterprise will avoid running afoul of the Commerce Clause of the United States

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[1] *Norfolk & Western Railway Company, et al. v. Missouri State Tax Commission*, 390 U.S. 317, 324 (1968), stands for the same proposition:

> The value [of an interstate enterprise] may be ascertained by reference to the total system of which the intrastate assets are a part.

[2] Petitioner's description of Oregon's time-based formula for apportioning mobile property of interstate airlines, (Pet. Cert. at 3) is accurate.

Constitution[3] if it (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The Due Process Clause[4] requires that the taxing state have sufficient contact with the enterprise to confer jurisdiction to tax, and that the tax be fairly apportioned to avoid taxation of extraterritorial value. *See Norfolk & Western Railway Company v. Missouri Tax Commission*, 390 U.S. 317, 323-25. The two tests, thus, have much in common.

Despite the agreement of both petitioners that their respective enterprises have a substantial nexus with the State of Oregon, and thus a taxable situs in Oregon, the airlines doggedly argue throughout their petition as if this case involved a dispute over nexus. It does not. The issue in this case is fair apportionment of a unit of interstate property that has an acknowledged taxable situs in the State of Oregon. The major thrust of this response is directed to the fundamental error of the airlines' position: the assumption that Oregon taxes individual flights or airplanes and the conclusion that, as a result, those flights or planes must have an individualized nexus with the state. Neither proposition is correct. Oregon taxes a portion of the unit of each airline's mobile property, a unit that unquestionably has a taxable situs in the state. Oregon apportions on the basis of the presence of that unit within the state.

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[3] Article I, section 8, clause 3, of the United States Constitution provides, in pertinent part:

> Congress shall have Power . . . To regulate Commerce . . . among the several States.

[4] The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Because the airlines misdirect the focus of their arguments to the issue of nexus, they address the question of fairness only indirectly. When they address it, they take the inconsistent position, on the one hand, that Oregon's system exposes them to the prospect of double taxation and, on the other, that no state may tax them for the time while they are flying over Oregon.

This brief addresses the Oregon system of apportioning mobile property of interstate airlines primarily in light of the Commerce Clause tests. That discussion also demonstrates compliance with the requirements of Due Process. In the course of that analysis, respondent addresses petitioners' assertion that cases from this Court have implicitly or expressly disapproved Oregon's system.

A. The Commerce Clause.

1. The airlines have a "substantial nexus" with Oregon.

a. Each airline, as an enterprise, has a situs in Oregon and is subject to Oregon ad valorem property taxes.

The airlines base their argument almost entirely on the fundamentally erroneous proposition that Oregon taxes individual aircraft or flights, and that each such aircraft or flight must have an individualized substantial nexus with the state to be considered in DOR's apportionment formula. That interpretation misconstrues what Oregon actually does and leads the airlines into misinterpretation of this Court's cases.

The state does not tax individual airplanes or flights, or even buildings or other ground equipment. Rather, it taxes units of property owned and used by interstate enterprises—as wholes—and bases the proportion of each whole to which it applies its tax on the percentage of that whole located in Oregon. As the Oregon Supreme Court stated:

> This premise—that the Department assessed taxes against overflights—is the fly in the airlines' ointment. The Department did not assess overflights or specific aircraft; the Department assessed each airline's aircraft property based on a formula reflecting (in part) time spent in the air by that aircraft. The validity of each airline's tax assessment does not depend upon whether the state could have assessed a tax against overflights—the state did not do so. Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit.

Alaska Airlines, Inc. v. Department of Revenue, 307 Or. 406, 411, 769 P.2d 193 (1989); Pet. Cert., Appendix A at 8a (emphasis in original).

The airlines misinterpret this Court's cases because the principles petitioners extract from those cases were developed to determine whether an enterprise has a sufficient nexus with a state to justify a state tax on the enterprise at all. Each airline tacitly acknowledges that it has a taxable situs in Oregon. *See* Pet. Cert. at 2-4. DOR is aware of no case from this Court or any other court that holds or even suggests that where an interstate enterprise has an acknowledged situs in a given state, each individual activity the state considers for purposes of apportionment must have a separate, individualized nexus with the state. Rather, the Court has required only that the apportionment formula be "fair."[5]

> [5] After a nondomiciliary State has acquired jurisdiction to impose a tax on vehicles moving in interstate commerce, . . . there frequently arises the question whether the exaction is equitably apportioned. The judicial touchstone for determining the value of the apportioned property usually is the "average physical presence within the jurisdiction." . . . Such "average presence" is designed to attribute to each taxing State its "fair share of an interstate transportation enterprise" for tax purposes. . . . That "fair share" may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing state.

HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 7.9, p. 396 (1981) (footnotes omitted).

b. Cases from this Court do not hold that each portion of an interstate enterprise must have a separate situs in the taxing state before it may be considered in the state's apportionment formula.

Contrary to the airlines' assertion, the Court's cases do not hold that a state may not consider flyover time in apportioning the value of a unit of mobile property with an acknowledged situs in the taxing state. Rather, those cases deal exclusively with the existence or nonexistence of a nexus between the enterprise and the state seeking to levy a tax. It is true that in the course of determining whether a nondomiciliary state might be able to impose a tax on the same property as the domiciliary state, thereby subjecting the taxpayer to the possibility of double taxation, the Court notes that a state may not tax an airplane merely passing over that state. *See Goldberg v. Sweet*, 488 U.S. ___, 109 S.Ct. 582, 589 (1989) *citing Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring) and *United Airlines v. Mahin*, 410 U.S. 623, 631 (1973).[6] None of those cases, however, purported to consider an apportionment issue. Rather, the Court appeared to be stating that the mere fact an aircraft flew over a state, without more (*i.e.*, without that aircraft or the enterprise of which it is a part otherwise having a substantial nexus with the hypothetical taxing state as a result of other contacts with that state) did not create a sufficient nexus to confer taxing power on the overflown state. Oregon does not suggest it could tax overflying aircraft belonging to airlines having no nexus with the state, nor does it seek to tax such airlines. But these petitioners are not those

[6] There is reason to question how much vitality some of petitioners' cases retain after *Complete Auto Transit v. Brady, supra.* For example, *United Airlines v. Mahin*, 410 U.S. at 631, relied on *Helson v. Kentucky*, 279 U.S. 245 (1929). At least one recognized tax law authority has raised cogent questions about *Helson*'s continuing force after *Complete Auto Transit.* HARTMAN, *supra*, § 10:5.

airlines. These petitioners concede they have a sufficient nexus with Oregon to allow it to tax them.

In *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), the Court concluded that eighteen landings per day by the complaining airline was a sufficient nexus to confer taxing power on the State of Nebraska. By emphasizing a portion of the Court's opinion, petitioners appear to suggest the Court concluded the state could apply its tax only to those aircraft that made individual landings in the state. The airlines quote the Court as follows:

> [T]he Court held that "the situs issue devolves into the question whether eighteen stops per day by [Braniff's] aircraft is sufficient contact . . . to sustain . . . an apportioned ad valorem tax *on such aircraft*." 347 U.S. at 600-01.

Pet. Cert. at 8 (emphasis by petitioners). However, as the opening sentence of the opinion makes clear, "[t]he question presented [in *Braniff*] is whether the Constitution bars the State of Nebraska from levying an apportioned ad valorem tax on the flight equipment of appellant, an interstate carrier." 347 U.S. at 591. This description refers to the airline's flight equipment in general, not by reference to whether any particular aircraft landed in the state. Neither the Court's description of the issue nor anything else in the opinion suggests the Court intended to subdivide that flight equipment into those portions of the fleet having an individual nexus with Nebraska and those that did not. Indeed, petitioners have been unable to cite this Court to a single case in which this Court or any other court has concluded or even hinted that each activity a state seeks to include in its apportionment formula must have an individualized nexus with the state even if consideration of that activity leads to manifestly fair apportionment.

It is only by compressing the issues of nexus and apportionment that the airlines find assistance in the cases they

cite. Once the airlines concede that the unit of each petitioners' fleet of aircraft has a situs in Oregon, it becomes evident that principles governing the fair apportionment of taxable property, not principles governing the ability of the state to reach that property, are the principles on which the discussion should center.

Thus, the primary basis of the airlines' claim that this case presents an issue of significance depends in its entirety on petitioners' detour into an issue simply not present in the case. As the following section demonstrates, the real issue in this case, the fairness of the apportionment formula, involves nothing more than a fact-specific application of settled principles.

2. Oregon's apportionment formula is fair.

A state has wide latitute in determining the apportionment formula it will apply to an interstate enterprise having a situs within its borders. *Norfolk & Western Railway Company et al. v. Missouri State Tax Commission*, 390 U.S. 317, 326 (1968). An enterprise challenging such a formula has the heavy burden of showing that the method applied grossly overreaches the values represented by intrastate assets. *Ibid.*[7] The state need not demonstrate that the results yielded are precise valuations of the assets located in the state. *Id.* at 324.

In two cases in which the Court concluded enterprises met this heavy burden, railroads were able to prove that the application of the mileage formula in question resulted in the attribution to the taxing state of far more of the railroads' rolling stock than was actually present in the state at any

[7] In *Norfolk*, the Court discussed mileage-based formulas for determining the apportionment of railroad rolling stock. Flight time is an essentially direct equivalent for mileage in the apportionment of aircraft "flying stock." That is, if Oregon chose to apportion on the basis of miles flown within the state, it would still include mileage for overflights in its apportionment of petitioners' enterprises. Principles governing mileage-based formulas should be equally applicable to Oregon's time-based formula.

given time. *Norfolk & Western, supra; Union Tank Line Company v. Wright*, 249 U.S. 275 (1919). The airlines made no effort to make a similar showing. Rather, they rely almost exclusively on their inapposite claim that overflights have no individualized nexus to the state.

The fairness of the Oregon formula is easily demonstrated. As the Oregon Supreme Court aptly noted, petitioners' aircraft are on the ground or in the air at any given time; DOR's formula simply reflects that fact. *Alaska Airlines, supra*, 307 Or. at 415 (Pet. Cert., Appendix A at 13a). "More precisely, the formula reflected that portion of time each airline's aircraft property spent on the ground or in the air *in Oregon*." *Ibid* (emphasis in original). Petitioners' primary disagreement with the Oregon Supreme Court's determination that the challenged formula is fair inescapably centers on the question whether overflights constitute activity "in Oregon," thus ensuring that including that flight time in the apportionment formula does not result in unfair apportionment. *See* Pet. Cert. at 9-10.

Petitioners erroneously assert the Oregon Supreme Court based its conclusion that these flights were "in" Oregon on the potential application of Oregon's criminal laws to those rights and the possibility of search and rescue assistance for downed planes. Pet. Cert. at 10. While the Oregon Supreme Court did discuss those factors, its reasoning went further.

First, the court noted the airlines did not contend that flight time in Oregon of interstate flights that *did* land in Oregon could not be considered in apportioning the unit's value. The court pointed out that the airlines did not suggest how that time was distinguishable from flying time of planes that overflew the state but did not land. *Alaska Airlines, supra*, 307 Or. at 413 (Pet. Cert., Appendix A at 9a-10a). The airlines similarly make no effort to explain that distinction to this Court. By conceding DOR may properly consider in the apportionment formula flight time of aircraft that do touch

down in Oregon, the airlines highlight their belief the state may only consider activities with individualized nexus to the state in that formula.

The Oregon Supreme Court also asked the obvious question "where an overflight was if not 'in' this state while traveling within the borders of this state." *Ibid.* The elegant simplicity of this question should not obscure its importance or the devastation petitioners' inability to answer it wreaks on their claim. Wherever an airplane flying over Oregon may be, it is unquestionably not "beyond Oregon's borders." *Nashville, C. & St. L. Railway v. Browning*, 310 U.S. 362, 365 (1940). An airplane that flies over Oregon but does not land in the state does not necessarily have its own separate situs in the state. However, that airplane is unquestionably "in Oregon" while within Oregon's borders. If it is one of petitioners' airplanes, it is part of an enterprise with an acknowledged situs in the state. Petitioners seek to deflect attention from this self-evident fact by arguing that Oregon provides no services or benefits to overflying aircraft. Pet. Cert. at 10-12. This argument, like so much of petitioners' claim, is based on the erroneous assertion that Oregon must establish a separate nexus with each flight or aircraft it seeks to include in its apportionment formula.

Factors often cited by the Court demonstrate the fairness of the Oregon formula. First, it is "internally consistent" in that, if applied by every taxing jurisdiction, it would result in no more than 100 percent of the unitary business' property being taxed. *Container Corportion of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). If every state adopted Oregon's time-based formula, each state's taxes would be based only on the time aircraft were on the ground or in the air in that state. Since they cannot be in more than one state at

once, there would be no risk of double taxation.[8]

The tax is also "externally consistent" because, like formulas based on mileage, the time-based formula accurately reflects that proportion of the airline's property located in Oregon. *See Goldberg v. Sweet, supra,* 109 S.Ct. at 590. The court has noted its general approval of mileage-based formulas for apportioning interstate transportation businesses, *e.g., Nashville, C. & St. L. Railway v. Browning, supra,* 310 U.S. at 365 (citing cases), unless the use of that formula produces a grossly distorted result. *See Norfolk & Western Railway Company v. Missouri Tax Comm., supra,* 390 U.S. at 326-27. The airlines have completely failed to make such a showing.

The airlines assert, however, that adoption of Oregon's approach by other states would result in double taxation. Pet. Cert. at 13.[9] They base this conclusion on the assertion that *Goldberg v. Sweet, supra,* would permit the state in which the flight originates or terminates to impose a flat tax on the entire flight. The attempt to equate the telephone signals discussed in *Goldberg* with aircraft flights fails for several reasons. Not the least of those is that *Goldberg* laid great stress on the impossibility of determining the routes by which individual telephone calls went from their point of origin to their destination. 109 S.Ct. at 590. *Goldberg* rejects the possibility of apportionment of interstate telephone calls on practical rather than constitutional grounds. The case therefore

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[8] Even if every state adopted Oregon's formula and apportioned based only on the time aircraft were in that state, the airlines would be undertaxed as they are now. Time flying over a state the airline does not serve, and therefore has no nexus with, and time flying over the ocean to Hawaii, for example, would not be included in the formula.

[9] This claim is patently inconsistent with petitioners' third argument. That argument appears to be that permitting Oregon to consider overflights in its apportionment formula would result in an overall increase in taxes on the airlines by permitting taxation of what is now an untaxable event. *See* Pet. Cert. at 22. If overflights are presently untaxable by the state of domicile or the state where the flight originates or terminates—as opposed to taxable but merely untaxed by those states, an issue of no constitutional significance—double taxation is not an issue.

does not imply, as petitioners suggest, that the Constitution permits only the states where a flight originates or departs to apportion based on that flight.[10] Indeed, the Court expressly noted that where vehicles pass through a state there is no practical or constitutional difficulty in apportionment based on mileage. *Ibid.* As noted earlier, flight miles easily could be substituted for time in the Oregon formula without changing the relative apportionment of petitioners' units. Moreover, because *Goldberg* involved a flat tax, not apportionment, its applicability to this case is further strained.

The only basis for concluding the state of domicile could include air time over Oregon in its apportionment formula, a claim pressed in the Oregon court but muted in the petition, would have to be found in *Northwest Airlines v. Minnesota, supra.* In *Northwest Airlines*, the Court held the state of domicile could tax the full value of the airline's fleet because none of the airline's mobile property had acquired an "actual situs" in any other state. 322 U.S. at 296, fn 2. Property could only acquire "actual situs" by being permanently located in the other state, in which case the second state would acquire sole power to tax. *Ibid.* The three-member plurality and one of the concurring Justices rejected outright the principle of apportionment as applied to airline property. *See* HELLERSTEIN, CORPORATE INCOME AND FRANCHISE TAXES, ¶ 4.10[3] (1983). The fifth Justice declined to reject apportionment in principle. 322 U.S. at 301-02 (Black, J., concurring). Ten years later, the Court approved apportionment in *Braniff Airways v. Nebraska State Board of Equalization and Assessment, supra*, thereby depriving the rationale employed by the *Northwest Airlines* plurality of much of its author-

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[10] While it may be true that the domiciliary state could consider the flight time or mileage over a state with which the airline had no nexus at all, *see* section III, *infra*, that issue is not presented in this case inasmuch as the airlines have a situs in Oregon and Oregon does not seek to consider time over any other state in its formula.

ity. HELLERSTEIN, *supra*, at 133. Thus, there is no support for claiming the domicile state could apportion based on time or mileage over Oregon or over any other state having a substantial nexus with the enterprise.

Moreover, it is insufficient simply to assert a risk of multiple taxation. Rather, a complaining taxpayer must present proof of actual cumulative taxation by more than one state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276 (1978). Petitioners have presented no evidence that any other state actually seeks to tax their property by reference to flight time over Oregon. As in *Moorman*, the taxpayers' claim is mere speculation. *See* 437 U.S. at 276.

Thus, Oregon's formula is internally and externally consistent, it does not lead to double taxation and petitioners have not shown that it leads to taxation in excess of the airlines' intrastate activity. Petitioners' persistent efforts to focus the argument on nexus only serve to emphasize their complete failure to present any evidence to establish that application of the challenged formula leads to disproportionate taxation of their mobile property by Oregon. *See, e.g., Norfolk & Western Railway Co. v. Missouri State Tax Commission, supra*. Nor could they do so, because the Oregon formula is fair.

3. The Oregon formula does not discriminate against interstate commerce.

Petitioners argue that including flyover time in the apportionment formula discriminates against interstate commerce generally and against some carriers in interstate commerce as opposed to others. The airlines did not raise this issue in the Oregon Tax Court or Supreme Court, nor was it decided by those courts. *See Alaska Airlines v. Department of Revenue*, 307 Or. at 413-14 (Pet. Cert., Appendix A at 11a)[11]; *Alaska*

[11] After setting out the four-part Commerce Clause test of *Complete Auto Transit*, which includes non-discrimination against interstate commerce, the court stated:

(Footnote continued on next page)

Airlines Inc. v. Department of Revenue, 10 Or. Tax 518 (1987) (Pet. Cert., Appendix B at 17a); Appellant's Brief and Abstract of Record, Oregon Supreme Court No. S34860, pp. 24-32. Because the airlines did not raise this claim below, DOR had no opportunity to make a record on the issue and the state courts neither considered nor decided this claim of discrimination against interstate commerce. This Court generally does not consider a claim raised for the first time on appeal to this Court, *see* 28 U.S.C. § 1257(a) (1988); *Steagald v. United States*, 451 U.S. 204, 208 (1981), and it should not do so in this case.

However, even if the Court were to consider this claim, it is without merit.

> [I]n the interstate commerce context . . . the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment . . . a fairly apportioned tax [will] not be found invalid simply because it differ[s] from the prevailing approach adopted by the States.

Container Corporation of America, supra, 463 U.S. at 171. Like much of petitioners' argument, the discrimination claim depends on petitioners' constant attempts to focus the inquiry on individual flights or aircraft. Because that focus is misdirected, petitioners' argument is incorrect. Oregon apportions *all* mobile airline property that has a situs in Oregon, whether it belongs to an interstate or an intrastate airline, for all flight time within Oregon's borders. Applying petitioners' logic, Oregon discriminates against intrastate airlines because it taxes *all* of their flight time, but only a portion of the flight time of interstate airlines.

(Footnote continued from previous page)

> [The airlines] argue that the 1986 taxes were not applied to activities with a substantial nexus with this state, fairly apportioned or fairly related to services provided by this state.

307 Or. at 414; Pet. Cert., Appendix A at 11a.

The suggestion that Oregon discriminates in favor of those airlines having no landings in Oregon is similarly meritless. Oregon cannot tax an interstate business that has no situs in Oregon. Thus, the fact Oregon taxes petitioners while it does not tax airlines with no nexus with Oregon is not a consequence of state action or policy choice. Rather it is the product of petitioners' choice to do business in Oregon and the choice of other carriers to concentrate their activity elsewhere.

4. The Oregon tax is fairly related to services provided by the state.

In *Commonwealth Edison Company et al. v. Montana*, 453 U.S. 609 (1981), the Court refined this prong of the *Complete Auto Transit* test. The Court noted this part of the test is "closely connected" to the first prong—the requirement of nexus with the taxing state. 453 U.S. at 625-26. The Court expressly rejected any suggestion the taxes must be reasonably related to the value of services provided to the activity or that the mere amount of the tax would render it constitutionally suspect. 453 U.S. at 623-25. Rather, the taxing state may require the taxpayer to shoulder its "fair share" of the state's general revenue requirements. 453 U.S. at 626-27. Noting that Montana's 30 percent coal severance tax was measured by a percentage of the value of the coal taken, the Court had no difficulty concluding the tax was in "proper proportion" to activities in the state. *Ibid.* The same reasoning applies with equal force to the Oregon tax. The apportionment passes muster under this prong of the Commerce Clause test because Oregon bases that apportionment squarely on petitioners' activities within the state.

B. The Due Process Clause.

The airlines' Due Process argument is limited to the same faulty claim that permeates the rest of their argument: the erroneous assertion that each separate flight or aircraft must have its own nexus with Oregon before DOR may consider its activities in the apportionment formula. For the same rea-

sons the formula does not offend the Commerce Clause, it passes Due Process muster. The property being taxed, the unit of the airlines' mobile property, has a situs in Oregon. The basis for the challenged apportionment is presence within Oregon's borders. As a result, Oregon's system does not project its taxing power beyond its borders and it therefore does not offend the Due Process Clause.

II. THE CASES ON WHICH PETITIONERS RELY DO NOT DEMONSTRATE A CONFLICT AMONG THE LOWER COURT DECISIONS.

Petitioners assert that lower courts are in conflict on this issue, and they cite *Northwest Airlines, Inc. v. State Tax Appeal Board*, 720 P.2d 676 (Mont. 1986) and *Blangers v. Department of Revenue and Taxation*, 763 P.2d 1052 (Idaho 1988). Neither case supports petitioners' assertion.

Northwest Airlines, Inc. v. State Tax Appeal Board, is an income tax case. The Montana court decided it solely by reference to Montana statutes. Although the court concluded that overflights were not "in" Montana, it did so as a matter of state statutory interpretation. The court held only that the Montana statute granting authority to apportion based on business activity "in this state" was not intended to reach overflight activity. 720 P.2d at 677-78. The court expressly declined to address whether such taxation violated the state or federal constitutions. 720 P.2d at 678. The concurring justice left no doubt the case was decided solely as a matter of interpreting the will of the Montana Legislature by pointedly noting that using overflight mileage in determining an airline's income taxes

> is neither illegal nor unfair; and that the legislature and the department of revenue may well consider such a factor as they revamp their laws and regulations to cover the hole in the income tax law pointed out in this Court's opinion.

720 P.2d at 679 (Sheehy, J., concurring).

Like so much of the authority on which petitioners rely, *Blangers v. Department of Revenue & Taxation, supra*, addresses nexus, not apportionment. The tax the court considered was an income tax levied against employees of a railroad that passed through Idaho without stopping there. Applying the *Complete Auto Transit* factors, 763 P.2d at 1056, 1069, the court concluded those employees had insufficient nexus to Idaho to render them subject to Idaho income taxation. 763 P.2d at 1055, 1070-71. The court's dictum referring to overflight merely illustrated the lack of nexus an overflying businessman, as opposed to an overflying airplane, would have with the State of Idaho. *Id.* at 1071. The court neither stated nor purported to state a principle relevant to apportionment of taxes for an entity with an admitted nexus with the taxing state.

Neither of these cases conflicts with Oregon's determination that overflight time of airplanes belonging to an airline with a situs in Oregon is a fair part of the apportionment of that airline's property or with the state decisions cited by petitioners agreeing with that conclusion. *See* Pet. Cert. at 17.

III. PETITIONERS' CLAIM THAT APPLICATION OF OREGON'S APPORTIONMENT FORMULA DOES OR WILL CAUSE OVERTAXATION OF AIRLINES IS INCONSISTENT WITH THEIR OTHER ARGUMENTS AND RAISES NO CONSTITUTIONAL ISSUE.

Petitioners' final argument is nothing more than a complaint the airline industry is taxed too heavily. That complaint presents no constitutional issue; it is properly addressed to Congress and not to this Court. *See, e.g.*, Section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1982) (providing tax relief to railroads).

Petitioners appear to suggest *no* state would be able to consider their flight time over Oregon or other states in which

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v.

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Respondent.

On Petition for a Writ of Certiorari to the Oregon Supreme Court

REPLY BRIEF FOR PETITIONERS

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1. Oregon does not deny that this Court's decisions preclude it from directly imposing an aircraft overflight tax. Instead, the State argues that it has not really imposed such a tax, but has simply counted overflight as an element of its aircraft property tax. Moreover, the State argues, this Court's overflight decisions are *nexus* cases, not *apportionment* cases, and that merely because the State lacks nexus to tax an activity does not mean that activity may not be fairly attributed to the State through an apportionment formula. These arguments are not only wrong; they are directly contrary to fundamental Commerce Clause and Due Process principles established by this Court. Indeed, if the decision below stands for the propositions now advanced by the State, certiorari would be appropriate for that reason alone.

a. There is no question that the tax in this case is premised on only two activities—time spent in Oregon by petitioners' flights that take off or land in the State, and time spent by their flights that only pass over the State. There is also no question that the overflight activity accounts for approximately half of the resulting tax. And there finally is no question that each and every overflight is specifically included in the taxing formula and that each additional overflight directly increases Oregon's tax by a measurable amount. Nevertheless, the State contends that overflight is *not* being taxed in this case; rather, the State says, "it taxes units of property owned and used by interstate enterprises—as wholes—and bases the proportion of each whole to which it applies its tax on the percentage of that whole located in Oregon." State Opposition ("Opp.") at 4.

In other words, the State believes that by levying a property tax on all of petitioners' planes as a *unit*, and then measuring the portion of that unit attributable to the State on the basis of overflight, it can avoid the resulting assessment being characterized as a tax on overflight. This Court's decisions do not permit such an exalting of form over substance. Instead, the Court looks to the "underlying economic realities" of an interstate company being taxed as a unitary business, *Exxon Corp.* v. *Dep't of Revenue of Wisconsin*, 447 U.S. 207, 223 (1980), and focuses on "the practical effect of [the] challenged tax." *Goldberg* v. *Sweet*, 109 S.Ct. 582, 588 n.11 (1989); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980). Furthermore, the label the State puts on the tax "is of no moment in determining the constitutional significance of the exaction." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 443 (1940). Rather, as the Court has long made clear, "in passing on [the tax's] constitutionality, we are concerned *only with its practical operation* . . . ." *Id.* at 444 (quoting *Lawrence* v. *State*

Tax Commission, 286 U.S. 276, 280 (1932) (emphasis supplied)). Here, in practical and economic effect Oregon has imposed a substantial overflight tax on petitioners. The constitutionality of the tax must be judged on the basis of that effect.

b. The State acknowledges, as it must, that *Goldberg* v. *Sweet*, 109 S. Ct. at 589, *United Airlines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973), and *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring), declared that aircraft overflights do not provide a constitutionally sufficient basis for State taxes. Opp. 6. Yet, the State argues, "[n]one of those cases . . . purported to consider an apportionment issue" and they therefore do not preclude inclusion of overflight in an apportionment formula. *Id.* This argument not only misreads the cited cases, but seriously misconstrues the nexus and fair apportionment requirements of the Commerce and Due Process Clauses.

Goldberg addressed the question whether a State could apportion to itself (and tax) the whole of interstate phone calls that are paid for in that State and originate or terminate there. The Court said it could, reasoning that no intervening State had sufficient contact to tax the call, just as no fly-over States have sufficient connection to tax aircraft overflight. 109 S.Ct. at 589. Similarly, in *Mahin*, the Court held that a State could apportion to itself (and tax) the whole of fuel to be consumed in interstate flight, because none of the fly-over States could tax the consumption. 410 U.S. at 631. Yet under the State's view in this case, both *Goldberg* and *Mahin* may be easily avoided by States wishing nevertheless to tax "overflying" phone calls or airliners: the States need only include those activities in apportionment formulas and on that basis tax entities over which the State otherwise has nexus. Such a result wholly subverts the Court's decisions: *Goldberg* and *Mahin* both approved the *unapportioned* taxation of an interstate event on the express holding that *no other State*

could tax that same event. Oregon is wrong to contend that it is not bound by these holdings and that it is authorized to tax events that are already fully taxable by other States.[1]

c. Oregon is furthermore wrong to contend that its overflight tax could otherwise meet this Court's fair apportionment requirements. Those requirements, again, are practical ones, as shown by cases the State itself cites: "[a]ny formula used must bear a rational relationship, both on its face and its application, to property values connected with the taxing State." *Norfolk & Western Ry.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968) (citing *Fargo* v. *Hart*, 193 U.S. 490, 499-500 (1904)). Under both the Due Process and Commerce Clauses, the apportionment must "in practical operation [have] relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott* v. *Mississippi Valley Barge Line*, 336 U.S. 169, 174 (1949). *Accord*, *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 600 (1954). In short, as the Court held in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 661 (1948), "the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears special relation."

In light of these standards, we showed in our petition that the State's overflight tax has *no* connection to property values in the State, that in practice it has *no* relation to opportunities, benefits, or protections provided by the State, and that, indeed, the substantial tax the State exacts is not based on *any* specific relation with the over-

[1] Moreover, although Oregon claims that it is only taxing airline property that already "has a situs in Oregon," Opp. 14, its apportionment formula does *not* so provide. That formula taxes *all* of petitioners' overflying aircraft, whether or not the aircraft otherwise take off or land in Oregon.

flight at all. Petition ("Pet.") at 9-12.[2] The State says, however, that the fact that it offers no benefits or services to the overflight and has no special relationship to it is irrelevant. Opp. 9-10. It is enough, the State observes, that the overflight be "in" the State, which it must be since it could not be anywhere else. Opp. 10. Indeed, the State says that the simplicity of this observation "should not obscure its importance or the devastation petitioners' inability to answer it wreaks on their claims." *Id.* But the question is not simply whether the overflight is "in" the State. The question, rather, is whether the State has a sufficient relationship with the overflight to justify the particular tax the State has assessed. Here, applying this Court's standards, the answer to that question is clearly no.[3]

2. We showed in our petition that the State's overflight tax not only directly violates decisions of this Court

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[2] These standards are the same ones applied by the Court under the "external consistency" test, heavily relied on by the State. Opp. 11. As the Court said in *Goldberg*, external consistency requires that a State tax "only that portion of the . . . interstate activity" that is related in "practical or economic effect" to "in-state business activity." 109 S.Ct. at 589. Oregon's overflight tax does not meet this test.

[3] Even if the question were simply whether the overflight occurs "in" the State, it is doubtful that the answer is yes. Certainly, the single case cited by the State (Opp. 10) does not support its position on that question. That case, *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362 (1940), concerned a property tax levied on rolling railway equipment and based on an apportionment formula related to miles of track in the State. *Id.* at 365. Such a formula has no application here. As the Oregon Supreme Court itself recognized, "aircraft are, of course, different from rolling stock. Rolling stock and railroad track touch the ground, but aircraft in flight, obviously do not. Overflight aircraft did not touch the ground in Oregon *at all* . . . ." Pet. App. 9a (emphasis in original). And just as obviously, the State's special relationship with, and services afforded to railroads in constant contact with the ground are wholly unlike overflying aircraft that have no contact with the State *at all*.

prohibiting such a tax, but that it also risks multiple taxation of interstate aircraft and necessarily discriminates against those aircraft. Pet. 12-13. With regard to multiple taxation, Oregon first contends that no other State could include flight time over Oregon in an apportionment formula. Opp. 11-13. This contention is flatly contradicted by *Goldberg*.[4] The State next contends that we "must present proof of actual cumulative taxation" in order to complain of it. Again, the State is wrong; in fact, this Court has "categorically rejected" any such requirement. *Tyler Pipe Industries* v. *Washington Dep't of Revenue*, 483 U.S. 232, 242 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-45 (1984). Finally, the State claims that it is inconsistent to complain of multiple taxation on the one hand, and complain on the other that *no State* may take account of overflight. Opp. 4, 17-18. But it is not our contention that no State may take account of overflight in a properly drawn apportionment formula. Rather, as we have shown, under *Goldberg*, *Mahin*, and *Northwest Airlines*, the originating or terminating State may consider it.[5]

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[4] As noted, in *Goldberg* this Court held that an originating or terminating State could apportion the whole of an interstate phone call's travel to itself, citing as support the cases indicating that the whole of interstate overflight is apportionable either to the terminus or domiciliary State. 109 S.Ct. at 589. The State is therefore wrong to say that no other State may apportion the overflight.

The State purports to distinguish *Goldberg* on the ground that it "involved a flat tax, not apportionment . . . ." Opp. 12. In fact, however, both this case and *Goldberg* required apportionment of the particular interstate activity to the State, after which a flat tax was applied to the apportioned amount.

[5] The State's assertions that we seek "to be free from *any* taxation" that takes overflight into account and that we claim "a constitutional guarantee of having . . . mobile property taxed at less than its full value" are completely unfair and inaccurate. Opp. 19 (emphasis in original). Indeed, while under the *Goldberg* rule *all* flight time may be easily apportioned—and therefore the aircraft

With regard to the discrimination against these petitioners, the State makes two points. First, it says that we did not raise discrimination below, and that the Court should therefore not consider it now. Opp. 14. But we *did* raise discrimination below, albeit as a State constitutional claim.[6] Where, as here, the substance of the State and federal discrimination claims are identical, where the State courts have interpreted State requirements as codifying federal constitutional requirements, and where petitioners did in fact raise the discrimination claim, the fact that they did not cite the particular constitutional provision now at issue does not preclude them from relying on it here. *See Braniff Airways*, 347 U.S. at 598-99. The State says, in any event, that so long as it uniformly applies its apportionment formula, there can be no discrimination. This completely ignores our contention that the *practical effect* of the overflight tax is both to charge interstate commerce a higher effective rate for State services than that charged intrastate commerce, and to arbitrarily charge some interstate carriers *no* tax (those with substantial overflight but no landings), while charging those with a single landing a tax both for that landing and all overflight. Such charges are discriminatory under this Court's decisions. *See* Pet. 13-14.

3. Finally, in addition to showing that Oregon's overflight tax contradicts numerous constitutional principles established by this Court, we also showed that such taxes are nevertheless proliferating, that the lower courts are divided over their permissibility, and that their widespread implementation would have a significant impact

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may be fully taxed—under Oregon's approach that would not be so. As the State concedes, its formula necessarily precludes full valuation by omitting flight over water and flight over States that happen not to have independent nexus with the overflying airline. Opp. 11 n.8.

[6] Appellants' Brief at 32.

on national transportation. Pet. 16-23. The State largely misunderstands the reasons we made these points; it was not to suggest that the points themselves raise issues warranting the Court's review. It was to show that the question presented by this case—the constitutionality of State taxes based on overflight—is an important one. Accordingly, when the State argues that the detrimental effects of overflight taxes is a matter for Congress to address, not this Court, it completely misses the point. Opp. 17. If overflight taxes such as the present one are unconstitutional, they are certainly a matter for this Court to address; and the fact that such taxes threaten to have a substantial adverse impact on the industry, consumers, and transportation in general is an additional reason for this Court to adjudicate that constitutional issue.

Similarly, the State misjudges the significance of the current division among the lower courts when it contends that that division involves nexus cases, not apportionment cases, and concerns facts not identical to the present case. Opp. 1, 17. What matters is that the lower courts are in conflict over the permissibility of overflight taxes, and that those taxes have now been approved in several forms—property taxes, income taxes, and sales taxes on goods purchased during overflight. See Pet. 16-18. Accordingly, because the overflight tax in this case contradicts decisions of this Court, because the lower courts are divided over the permissibility of such taxes, and because the further adoption of such taxes will have a major national impact, it is appropriate that this Court now determine their constitutionality.

CONCLUSION

For the foregoing reasons, and those stated in our petition, certiorari should be granted.

Respectfully submitted,

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